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# Examining Nontherapeutic Circumcision

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# EXAMINING NONTHERAPEUTIC CIRCUMCISION

*Stephen R. Munzer<sup>†</sup>*

## CONTENTS

I. INTRODUCTION .....	2
II. NATURE OF THE INQUIRY .....	2
III. CIRCUMCISION AND POSSIBLE HARMS .....	4
IV. BODILY INTEGRITY AND AUTONOMY .....	8
V. A TISSUE LOSS ARGUMENT .....	11
VI. A GENITAL SALIENCE ARGUMENT .....	17
VII. A PERMANENT MODIFICATION ARGUMENT .....	25
VIII. A GENDER EQUALITY ARGUMENT .....	28
IX. ASSERTED MEDICAL BENEFITS OF NEONATAL CIRCUMCISION .....	35
X. QUALIFYING THE RIGHT NOT TO BE CIRCUMCISED: LIMITATIONS, EXCEPTIONS, BALANCING, AND FACT-SENSITIVITY .....	42
<i>A. Limitations</i> .....	43
<i>B. Exceptions, Balancing, and Fact-Sensitivity</i> .....	44
XI. EVALUATION OF SOME ARGUMENTS FAVORING CIRCUMCISION BY SOME GROUPS .....	54
<i>A. Freedom of Religion: Toleration and Multiculturalism</i> .....	55
<i>B. Longevity</i> .....	59
<i>C. Social Meaning</i> .....	64
1. Committed Traditionalists (Judaism) .....	65
2. Accommodators (Judaism) .....	67
3. Resisters (Judaism) .....	68
4. Sunnah Conservatives (Islam) .....	70
5. Secular Liberals (Islam) .....	71

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6. One Spectrum or More? .....	71
7. Social Meaning and Underlying Practice.....	72
D. And Yet .....	73
XII. WHY LEGAL INTERFERENCE WITH NONTHERAPEUTIC CIRCUMCISION IS NOW ILL ADVISED.....	74
XIII. CONCLUSION .....	76

## I. INTRODUCTION

Do male minors have a moral right not to be circumcised without a medical indication? This question has become urgent in moral, political, and legal debate over the last several decades. An affirmative answer could have a serious impact on Jews and Muslims across the globe and potentially disrupt the frequency of secular circumcisions in the United States.

This Article argues that male minors have a moral anticipatory right-in-trust not to be circumcised without a medical indication. Based on norms of autonomy and bodily integrity, this Article's treatment of children's rights, parental rights, religious freedom, and tolerance offers arguments accessible to readers of many ethical, political, and intellectual persuasions. Three direct arguments rest on (1) the loss of nonrenewable functional tissue, (2) genital salience, and (3) limits on a parental right to permanently modify their sons' bodies. This Article also compares circumcision to a rare form of female genital cutting; the comparison contains the seed of an argument sounding in (4) gender equality. In current circumstances, however, it is unwarranted to treat nontherapeutic circumcision as a crime or subject it to burdens under tort, family, or administrative law.

Throughout I use interchangeably the phrases "nontherapeutic circumcision" and "circumcision without (a) medical indication." Unless otherwise stated, "circumcision" is the removal of the foreskin along with the thin mucous membrane that covers the head (glans) of the penis and the fold of mucous membrane (frenulum) that runs from the undersurface of the glans to the deep undersurface of the foreskin.<sup>1</sup>

## II. NATURE OF THE INQUIRY

This Article is a study in moral, political, and legal philosophy. It concentrates heavily on moral philosophy. But it also tackles issues of political philosophy, such as freedom of religion, tolerance and

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1. Circumcision thus understood is known in Judaism as circumcision *milah* and *peri'ah*. See *Circumcision*, 4 ENCYCLOPAEDIA JUDAICA 730, 731 (Macmillan Reference, 2d ed., 2007) [hereinafter *Jewish Circumcision*]. On anatomical and urological matters I often cite CAMPBELL-WALSH UROLOGY (Alan J. Wein et al. eds., 11th ed., 2016) (4 vols.) [hereinafter CAMPBELL-WALSH UROLOGY].

multiculturalism, and issues of legal philosophy, such as sanctions based on tort or administrative law, and the availability of exemptions for some religious groups.

Is it morally permissible to circumcise male minors without a medical indication? I do not frame this question in terms of moral justifiability because that might intimate that circumcision, if it is justifiable, is the morally right thing to do—or that one has a moral obligation to do it. Further, even if it is morally permissible, it might not be the only relevant morally permissible action, or even a prudent action. Here I understand morality as secular morality built on Aristotelian, Kantian, utilitarian, or other foundations. A medical indication is a good medical reason for a particular test, medication, procedure, or surgery. Ritual circumcision is common, perhaps nearly universal, among Jews and Muslims.<sup>2</sup> Secular neonatal circumcision is common in the United States, though not in most other parts of the world.

I suggest that it is harder to show that circumcision of male minors without medical indication is morally permissible than is often thought or assumed. In support of this suggestion, I appeal to moral norms of autonomy and bodily integrity. Under these norms I deploy three specific arguments—from tissue loss, genital salience, and permanent bodily modification—that make a provisional case against the moral permissibility of the nontherapeutic circumcision of male minors. Later, I test the power of my case by considering some counter-arguments: reparability, net benefits that arguably outweigh the right, tolerance and the freedom of religion, and the longevity and social meaning of the practice of circumcision in Judaism and Islam.

A significant issue is whether a minor child has any anticipatory moral rights that parents and others ought to respect prior to their child attaining majority (or some advanced sub-majority age, such as fourteen or sixteen). My arguments are—in a way clarified later—fact-sensitive. I do not claim that my arguments are decisive, that parents who have their male minors circumcised are morally blameworthy, or that social sanctions should be imposed on these parents. Nor am I arguing that the state should prohibit or interfere with religiously-based or socially-supported circumcisions.<sup>3</sup> I invite those who believe that there is nothing morally wrong with nontherapeutic circumcision to reconsider their belief.

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2. Debra L. DeLaet, *Framing Male Circumcision as a Human Rights Issue? Contributions to the Debate over the Universality of Human Rights*, 8 J. HUM. RTS. 405, 418 (2009) (“male circumcision is almost universally practiced by Jews and Muslims”).
  3. See Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 139 (1999) [hereinafter Shiffrin, *Wrongful Life*] (writing that “one may agree that procreation is morally problematic without entertaining any notion of directly regulating it.”).

Not all persons who think deeply about circumcision try to evaluate its moral permissibility. Some persons might believe that God has made a law that male minors belonging to some groups be circumcised. This law, some believe, comes from God's wisdom and rests on a divine rationality that is superior to human rationality. They might reject the idea that a secular explanation or defense of this law exists or is even relevant. They might also reject the idea that male minors have a moral right not to be circumcised. I invite readers who may hold these views to consider whether it makes any difference to their beliefs and practices to think of circumcision in terms of moral permissibility or impermissibility.

To say that male minors have a moral right not to be circumcised without medical indication is not to say that every parent who has them circumcised is morally blameworthy. Suppose a society routinely circumcises male infants. It has never occurred to parents in this society that there might be anything morally wrong about doing so. In my view, these parents would be morally blameless because they are unaware that male newborns have a moral right not to be circumcised. The situation would be different if, for example, parents became aware that some forms of circumcision were dangerous for male minors.

For whom is this Article intended? It is intended for educated parents who are deciding whether to circumcise their male child. For moral philosophers who are interested in biomedical ethics. For medical doctors and other circumcisers who are reexamining their views on the moral rights of male minors. For medical doctors from different medical cultures who are open to evidence and dialogue. For Jews and Muslims who might learn more about their religious traditions of circumcision. For Jews and Muslims who are predisposed to follow their religious traditions but wonder how other ways of thinking might assess these traditions. For readers who are untroubled by nontherapeutic circumcision and resistant to worrying about it. For those who speculate whether ancient practices have a place in a world increasingly shaped by human rights. For those who would tolerate potentially harmful practices in the name of multiculturalism. For scholars of gender and society who worry about the differential treatment of boys and girls. For those who are responsible for the health and the moral and religious upbringing of male children.

### III. CIRCUMCISION AND POSSIBLE HARMS

To many people, circumcision could seem a matter of parental choice. If a male minor has a medical indication for the procedure, doctors would explain to the parents why circumcision would be desirable. The most common medical indications include unretractable foreskin (phimosis), constriction of the glans by an unduly tight foreskin

(paraphimosis), and inflammation of the glans (balanitis).<sup>4</sup> In the absence of these or other indications, doctors in the United States often defer to parental wishes. Secular circumcisions are common in the U.S. Jewish and Muslim parents across the globe almost always seek circumcision—sometimes from doctors, sometimes from ritual circumcisers—for their male minors.<sup>5</sup>

Given this background, it might surprise some that circumcision could be a moral issue, let alone a vigorously contested moral issue. One reason for the contestation lies in the possible harms of circumcision. Following Feinberg in part, I define a *harm* as a setback to interests.<sup>6</sup> I treat harm as comparative and counterfactual for present purposes.<sup>7</sup> Here, I mention four classes of harm: pain, medical complications, adverse psychosexual effects, and functional impairments. Circumcising

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4. These and other indications are listed in Lane S. Palmer & Jeffrey S. Palmer, *Management of Abnormalities of the External Genitalia in Boys*, in 4 CAMPBELL-WALSH UROLOGY, *supra* note 1, at 3368, 3369-70 [hereinafter Palmer & Palmer]. For neonatal circumcisions, physicians often use local anesthesia and “the Gomco clamp, the Mogen clamp, [or] the Plastibell device.” *Id.* at 3370. For older boys and adults, urologists typically use general anesthesia and a sleeve incision technique, which is concisely described by Julian Wan, *Circumcision*, in HINMAN’S ATLAS OF UROLOGIC SURGERY 139-41 (Joseph A. Smith, Jr. et al. eds., 3d ed. 2012) [hereinafter Wan]. Palmer & Palmer, *supra* note 4, at 3370-71, are aware that “elective circumcision” is “controversial” but, perhaps because they are writing a chapter in a urology treatise, do not examine the burgeoning literature on the controversy.
  5. See DAVID L. GOLLAHER, CIRCUMCISION: A HISTORY OF THE WORLD’S MOST CONTROVERSIAL SURGERY (2000) [hereinafter GOLLAHER, CIRCUMCISION].
  6. JOEL FEINBERG, HARM TO OTHERS 33-34 (1984). For purposes of the harm principle, which is important for drawing the moral limits of the criminal law, Feinberg requires that a harm be not only a setback to interests but also a wrong. *Id.* at 34-36. I would not impose criminal sanctions for nontherapeutic circumcisions, and I do not require a wrong for there to be a harm.
  7. See Alastair Norcross, *Harming in Context*, 123 PHIL. STUD. 149, 150 (2005) (“An act A harms a person P iff P is worse off, as a consequence of A, than she would have been if A hadn’t been performed.”). The term “iff” means “if and only if.” Shiffrin, *Wrongful Life*, *supra* note 3, at 123-24 (calling for a noncomparative analysis of harm for wrongful-life situations); Seana Valentine Shiffrin, *Reparations for U.S. Slavery and Justice over Time*, in HARMING FUTURE PERSONS: ETHICS, GENETICS AND THE NONIDENTITY PROBLEM 333 (Melinda A. Roberts & David T. Wasserman eds., 2009), proposes a noncomparative analysis for reparations. Neither analysis is a plausible general account of harm. Under her view, babies, many animals, and some brain-damaged human beings could not suffer harm because they lack a rational will, whereas a person could, for altruistic reasons, rationally will herself to be harmed if necessary to benefit another person – as Ben Bradley, *Doing Away with Harm*, 85 PHIL. & PHENOMENOLOGICAL RES. 390, 400 (2012), points out.

a person causes pain either from the procedure or during the recovery, or both.<sup>8</sup>

Medical sources often separate early (acute) complications from late complications.<sup>9</sup> Early complications, in alphabetical order, include chordee, death, destruction (ablation) of the penis, glanular amputation, glanular necrosis, hemorrhage, iatrogenic hypospadias, penile skin bridge, redundant foreskin, and surgical site infection.<sup>10</sup> Late complications, in alphabetical order, include buried penis, chordee, epidermal inclusion cysts, excessive skin removal, meatal stenosis, meatitis, penile adhesions, phimosis, sepsis, and urethrocuteaneous fistula.<sup>11</sup>

Because authors differ over what counts as a complication, it is not possible to give a definite complication rate even for medical doctors,

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8. Newborns experience pain differently from older males. C. Celeste Johnston et al., *Pain in Neonates is Different*, 152 PAIN S65, S65 (2011). A neonatal/infant pain score (“NIPS”) helps to assess neonatal pain by examining facial expression, cry, breathing patterns, state of arms and legs, and state of arousal. B. Banieghbal, *Optimal Time for Neonatal Circumcision: An Observation-Based Study*, 5 J. PEDIATRIC UROLOGY 359, 359-61 (2009), acknowledges “controversy” over “whether it is ethical for parents to give consent” for circumcision, but finds that newborns older than eight days “are likely to exhibit significantly more signs of pain than those younger.” Ruth E. Grunau, *Long-Term Effects of Pain in Children*, in OXFORD TEXTBOOK OF PAEDIATRIC PAIN 30, 30 (2013), writes: “Circumcised boys who had received placebo [when circumcised as infants] showed higher facial reactions, cry duration, and observer visual analogue scale (VAS) pain ratings in response to immunization [at age 4 to 6 months] compared to the uncircumcised group.” For newborns, penile ring block anesthesia is generally superior to a penile dorsal nerve block or a topical anesthetic. Banieghbal, *supra* note 8, at 360; Wan, *supra* note 4, at 139. The frenulum is innervated not only by the penile dorsal nerve but also by a branch of the perineal nerve; Claire C. Yang & William E. Bradley, *Innervation of the Human Glans Penis*, 161 J. UROLOGY 97, 97 (1999). This fact helps to explain why a penile ring block is superior to a penile dorsal nerve block as a local anesthetic.
  9. See, e.g., Aaron J. Krill, Lane S. Palmer, & Jeffrey S. Palmer, *Complications of Circumcision*, SCI. WORLD J. 2458, 2462 (2011) [hereinafter Krill et al.]; Andrew L. Freedman & Richard S. Hurwitz, *Complications of Newborn Circumcision: Prevention, Diagnosis and Treatment*, in PEDIATRIC UROLOGY: SURGICAL COMPLICATIONS AND MANAGEMENT 245, 246-47 (Prasad P. Godbole et al. eds., 2d ed., 2015) [hereinafter Freedman & Hurwitz]. Both consider death and destruction to be rare.
  10. See Krill et al., *supra* note 9, at 2462-66; Freedman & Hurwitz, *supra* note 9, at 246-47. Both sources have explanations and photographs.
  11. See Krill et al., *supra* note 9, at 2462-67; Freedman & Hurwitz, *supra* note 9, at 247-55. Again, both sources provide explanations and photographs. Note that chordee can be either an early or a late complication.

let alone ritual circumcisers.<sup>12</sup> Some persons report adverse psychosexual effects from being circumcised.<sup>13</sup> Examples include distress over the appearance of their circumcised penises; shame, grief, and feelings of inferiority; and above all, anger and resentment toward parents or physicians for removing part of their sexual organs without their consent.<sup>14</sup>

Harm by way of functional impairment requires more explanation. Here a *function* of a body part is something that suits that part for some use. The foreskin, mucous membrane covering the glans, and the frenulum have at least the following functions: protection of the glans from injury; protection of the glans and the opening of the urethra (urethral meatus) from chafing and contaminants (dirt, sand, etc.); lubrication of the glans during sexual arousal to facilitate intercourse and masturbation; and erogenous sensation.<sup>15</sup> The frenulum is highly erogenous and facilitates the pleasurable gliding action of the foreskin during intercourse and masturbation.<sup>16</sup>

This explanation is not teleological; nor is it committed to any claim that the foreskin and adjacent structures are now, or once were, evolutionary adaptations. Rather, they might be only incidental byproducts—sometimes called spandrels, exaptations, or exaptions—of

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12. Freedman & Hurwitz, *supra* note 9, at 245 (“[A]cute complications should occur in less than 1% of patients . . .”). They add that the “[t]rue incidence of complications after newborn circumcision is unknown, in part due to differing opinions about what constitutes a complication.”. *Id.* at 246. See also Krill et al., *supra* note 9, at 2462 (remarking that “[d]uring a five-year period at Massachusetts General Hospital, 7.4% of all visits to a pediatric urologist were for circumcision complications”).
  13. See, e.g., N. Williams & L. Kapila, *Complications of Circumcision*, 80 BRIT. J. SURGERY 1231, 1234 (1993) (describing some psychological and sexual complications).
  14. LINDSAY R. WATSON, UNSPEAKABLE MUTILATIONS: CIRCUMCISED MEN SPEAK OUT 82, 153 *passim* (2014); Gregory J. Boyle et al., *Male Circumcision: Pain, Trauma and Psychosexual Sequelae*, 7 J. HEALTH PSYCHOLOGY 239, 335-36 (2002).
  15. See C. J. Cold & J. R. Taylor, *The Prepuce*, 83 BRIT. J. UROLOGY 34, 38 (Suppl. 1, 1999) [hereinafter Cold & Taylor]; P. M. Fleiss et al., *Immunological Functions of the Human Prepuce*, 74 SEXUALLY TRANSMITTED INFECTIONS 364, 364 (1998); Donald R. Taves, *The Intromission Function of the Foreskin*, 59 MED. HYPOTHESES 180 (2002); J. R. Taylor et al., *The Prepuce: Specialized Mucosa of the Penis and Its Loss to Circumcision*, 77 BRIT. J. UROLOGY 291 (1996). Cf. Ye Tian et al., *Effects of Circumcision on Male Sexual Functions: A Systematic Review and Meta-Analysis*, 15 ASIAN J. UROLOGY 662, 662 (2013) (suggesting “that circumcision is highly unlikely to adversely affect male sexual functions”) (bold type omitted).
  16. Cold & Taylor, *supra* note 15, at 37-38 & Figure 7 (“Ridge bands emanating from the frenulum” of a “retracted intact penis” have more nerves and greater sensitivity than the glans penis.).



evolutionary adaptations.<sup>17</sup> Furthermore, I do not take biological functions to establish any normative claim. But many such functions have significance for the interests of human agents, and for that reason it can be morally impermissible to deprive these agents of some of the functions mentioned.

The foregoing list of possible harms of circumcision is tentative. One has to consider how serious they are, how frequently they occur, and whether they are outweighed by possible benefits from circumcision. For the moment I simply wish to counter the view, popular in some quarters, that nontherapeutic circumcision is a harmless practice that raises no moral issues at all.

#### IV. BODILY INTEGRITY AND AUTONOMY

In addition to the potential harms circumcision may bring, the practice intrudes on the bodily integrity and autonomy rights of male minors. Bodily integrity is not the only form of integrity; we also speak, for instance, of moral and intellectual integrity. To advance the analysis of Part IV, it is helpful to put in place a vocabulary and framework that will facilitate the roles of bodily integrity and autonomy in the context of circumcision.

The expression “bodily integrity” is a phrase in common use that lacks a definite meaning. Let us try to make it definite enough for present purposes. Factually, bodily integrity is the absence of physical invasion of or removal of a part from the body of a human being. Normatively, bodily integrity is the inviolability of a human body to physical invasion or the removal of parts of the body without that person’s informed consent.

There are different kinds of norms to consider. Some norms are social or legal and others are moral; my concern, for purposes of this Article, is chiefly with moral norms. Among moral norms, we distinguish between the axiological and the deontological. Axiologically, the moral norm of bodily integrity is a value. The moral inviolability of a human body would usually be considered an important value in Western cultures and in most other cultures. Deontologically, the moral norm of bodily integrity takes the forms of duties, rights, and/or principles. Moral duties prescribe that others not physically invade or remove a part from the body of someone else without his or her informed consent. Moral rights protect a person from the physical invasion of or the removal of a part from his or her body. Moral

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17. On the evolutionary biology of non-adaptive traits, see Stephen Jay Gould, *The Exaptive Excellence of Spandrels as a Term and Prototype*, 94 PROC. NAT’L ACAD. OF SCI. USA 10750, 10754-55 (1997). My use of “functions” in the text is weaker than both Wright-functions and Cummins-functions but is philosophically closer to the latter. See Larry Wright, *Functions*, 82 PHIL. REV. 139 (1973); Robert Cummins, *Functional Analysis*, 72 J. PHIL. 741 (1975).

principles formulate the reasons for, limitations on, and exceptions to moral duties and rights of bodily integrity. Such principles, rights, and duties would usually be thought to be important moral norms.

We have not yet made normative bodily integrity definite enough for this Article. Many moral disputes about bodily integrity concern abortion, consensual sexual activity, the right to die, the ingestion of harmful substances, and police testing of blood and tissue samples. The task here is to think about normative bodily integrity in cases where the bodies of minors are modified by adults who have the physical power and often the wider social support to do so. Some cases are easy. No one wants to say that parents should be barred from clipping their toddler's fingernails or cutting his or her hair. Nor would anyone want to say that parents are morally permitted to tattoo a girl's forehead so that it appears to have a port wine stain in order that her older sister, who actually has a port wine stain on her forehead, might feel less conspicuous.

In the case of circumcising male minors without medical indication, three factors mark out cases of potential interest: the loss of nonrenewable functional tissue, the salience of the body part affected, and the permanent marking of a boy's body. Controversy over the moral permissibility of circumcision involves all three factors. But the factors are analytically distinguishable. Some permanent marks, such as a very narrow scar from a superficial cut made by an extremely sharp blade, involve little to no loss of nonrenewable functional tissue.<sup>18</sup> Genitals are more salient than and are viewed differently from other parts of the body, such as earlobes. Some losses of nonrenewable functional tissue are repairable by cosmetic surgery, and thus not permanent.<sup>19</sup>

In light of these distinctions, I develop in turn three arguments against the moral permissibility of circumcision of male minors. The tissue loss, genital salience, and permanent modification arguments help to show why nontherapeutic circumcision, if it causes harm, might ground a moral right not to be circumcised. All three arguments, taken together, make a substantial but not decisive case against the moral permissibility of circumcising male minors without medical indication.<sup>20</sup>

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18. On tissue regeneration after such a cut, see John C. Dallon et al., *Mathematical Modelling of Extracellular Matrix Dynamics Using Discrete Cells: Fiber Orientation and Tissue Regeneration*, 199 J. THEORETICAL BIOLOGY 449 (1999).
  19. For instance, skin is functional tissue, and its loss because of second- or third-degree burns may require wound coverage and cosmetic reconstruction. Reza Kordestani & John L. Burns, Jr., *Burns*, in *ESSENTIALS OF PLASTIC SURGERY* 195 (Jeffrey E. Janis ed., 2d ed., 2014). If a burn is severe, restoration of function may be incomplete.
  20. Some Islamic scholars employ a somewhat different understanding of bodily integrity from mine; see, e.g., Ghiath Alahmad & Wim Dekkers, *Bodily Integrity and Male Circumcision: An Islamic Perspective*, 44 J.

For the case to be decisive, one would have to take possible benefits into account, which is the task of Part IX.

Reflections on bodily integrity often pair with reflections on autonomy.<sup>21</sup> Autonomy is an important moral value, though not of equal moral and legal importance across cultures. Generally, there is a moral duty to respect autonomous choices. Infants and young boys are not currently autonomous, i.e., they do not possess the psychological capacity to be self-governing, which is part of the foundation for a moral right to be treated as self-governing.<sup>22</sup>

Yet, parents have a duty to respect the eventual autonomy of their offspring by not making harm-causing choices for them earlier than necessary. Accordingly, it is possible for a non-autonomous child to have what Joel Feinberg calls “anticipatory autonomy rights.”<sup>23</sup> While the child is a minor, these are “rights-in-trust,” which means that they “are to be *saved* for the child until he is an adult, but which can be violated ‘in advance’, so to speak, before the child is even in a position to exercise them.”<sup>24</sup> Legal examples of such rights include the child’s right to have a voice through a trustee in custody cases, in neglect hearings against parents, and under child labor laws.<sup>25</sup>

The net effect of the three arguments, if they are successful, can be stated in terms of either duties or claim-rights, which are correlatives. Parents have a duty to respect the bodily integrity of their male minor child and his anticipatory autonomy by not circumcising him without medical indication. Correlatively, a male minor has an anticipatory right-in-trust to bodily integrity in light of his anticipatory autonomy not to be circumcised without medical indication.

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ISLAMIC MED. ASS’N N. AM. 1 (May 20, 2012) [hereinafter Alahmad & Dekkers].

21. See Wim Dekkers et al., *Bodily Integrity and Male and Female Circumcision*, 8 MED. HEALTH CARE & PHIL. 179, 183 (2005).
22. This relationship between autonomy and self-governance rests on Stephen R. Munzer, *Research Biobanks Meet Synthetic Biology: Autonomy and Ownership*, in COMPARATIVE ISSUES IN THE GOVERNANCE OF RESEARCH BIOBANKS: PROPERTY, PRIVACY, INTELLECTUAL PROPERTY, AND THE ROLE OF TECHNOLOGY 11, 14-16 (Giovanni Pascuzzi et al. eds., 2013).
23. Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124, 126 (William Aiken and Hugh LaFollette eds., 1980) [hereinafter Feinberg, *The Child’s Right to an Open Future*].
24. *Id.* at 125-26 (emphasis in original).
25. *Id.* at 126. One philosopher has suggested to me that either autonomy or bodily integrity, but not both, is needed to ground my arguments. I disagree. As Dekkers et al., *supra* note 21, at 179 (emphasis in original), powerfully argue, “bodily integrity is a *prima facie* principle in its own right, closely connected with, but still fundamentally different from, the principle of personal autonomy, that is, autonomy over the body.” *Id.*

Mainly I employ rights discourse, in which some of the most important pieces are as follows. Parents have a right to exercise their discretion in making many choices on behalf of their male minor. In the parents' absence, a trustee or the state exercises this right. The object of this right, regardless of who exercises it, is the upbringing of the child. But a male minor has a right not to be circumcised without medical indication. The right-holder is the child—but anticipatorily so. While he is a minor, the right is to be exercised on his behalf and in his sole interest by one or both parents, or if need be by a trustee or the state. The object of the child's right is the protection of his bodily integrity and his autonomy.

Part X discusses the scope and weight of the child's right, limitations on and exceptions to his right, and balancing his right against other interests.

## V. A TISSUE LOSS ARGUMENT

The first of the three direct arguments is that intentionally causing the loss of nonrenewable functional tissue in the absence of a medical indication does not lie within a liberty-right, still less a putative claim-right, of parents to impose on their minor children.<sup>26</sup> The functions of the foreskin, frenulum, and mucous membrane covering the glans—mentioned in Part III—are important. Some of these functions have to do with sexual pleasure.<sup>27</sup> The medico-scientific jury is still out on

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26. A liberty-right lacks a correlative obligation on someone else, whereas a claim-right imposes a correlative obligation on someone else. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 716-18 (1917) (understanding a "right" (claim-right) as the correlative of a duty and a "privilege" (liberty-right) as the correlative of a "no-right," and understanding privileges (liberty-rights) as unilateral). In contrast, Bentham understands liberty-rights as bilateral. JEREMY BENTHAM, *OF LAWS IN GENERAL* 265-72, 276 (H. L. A. Hart ed., 1970); H. L. A. HART, *Legal Rights*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 162-74 (1982) (containing a revision of an article first published in 1962). Unlike Bentham, Hart insists that liberty-rights must have a perimeter of protection, though not a correlative obligation, to meaningfully count as a right of any kind. If Hart is correct, then one could say here that a parental liberty-right to make some choices regarding their offspring requires a perimeter of moral protection in favor of the parents. Perhaps morality provides a perimeter of some sort. My arguments in this Article cast doubt on the idea that any such perimeter is strong enough to give parents a liberty-right in Hart's sense to circumcise without medical indication.

27. *See* Cold & Taylor, *supra* note 15, at 37-39 (penile innervation), 41 (sensitivity and sexual function; absence of regeneration of amputated nerves).

whether circumcision has an adverse impact on male sexual pleasure.<sup>28</sup> Still, it is prudent to be cautious about claiming that no adverse impact exists, for the removed tissue can hardly perform whatever functions it had in the first place. More important than possible diminution of sexual pleasure are the medical risks of undergoing circumcision.

The fact that circumcision removes nonrenewable tissue is also important. Cutting a baby's hair or fingernails is unobjectionable, at least partly because these tissues are renewable. Similarly, it seems

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28. As the following, sometimes conflicting sources suggest, the evidence is inconclusive. Penile sensitivity is not identical with sexual pleasure; see, e.g., DaiSik Kim & Myung-Geol Pang, *The Effect of Male Circumcision on Sexuality*, 99 BJU INT'L 619, 620 (2007). Tests for the former need not reveal differences in the latter; Morris L. Sorrells et al., *Fine-Touch Pressure Thresholds in the Adult Penis*, 99 BJU INT'L 864, 868 (2007). Sexual pleasure is basically subjective, but that does not mean that all self-reports are reliable. Ideal studies would presumably involve (1) large numbers of subjects, (2) absence of confounding factors such as prior disease or injury, (3) men who chose to be circumcised as an adult for nonmedical reasons, and (4) men who were sexually active before and after the operation (i.e. a "pre/post" study). Few studies satisfy all of these criteria. Brian J. Morris & J. N. Krieger, *Does Male Circumcision Affect Sexual Function, Sensitivity or Satisfaction? – A Systematic Review*, 10 J. SEXUAL MED. 2644, 2644 (2013) ( $n = 40,473$ ) (finding no adverse effects on function, sensitivity, or satisfaction, and concluding that only satisfaction is a good proxy for sexual pleasure). Kenneth S. Fink et al., *Adult Circumcision Outcomes Study: Effect on Erectile Function, Penile Sensitivity, Sexual Activity and Satisfaction*, 167 J. UROLOGY 2113, 2114-15 (2002) ( $n = 43$ ) (the pre/post self-report study found that "[c]ompared to before circumcision, men reported reduced erectile function, decreased penile sensitivity, no change in sexual activity and improved satisfaction after circumcision"; again, only satisfaction is a good proxy for sexual pleasure.). Morten Frisch et al., *Male Circumcision and Sexual Function in Men and Women: A Survey-Based, Cross-Sectional Study in Denmark*, 40 INT'L J. EPIDEMIOLOGY 1367, 1372-75 (2011) (finding that more circumcised men than uncircumcised men had difficulties with orgasm after controlling for confounding factors, whereas Danish women with circumcised partners had more problems with orgasm, lubrication insufficiency, painful sexual intercourse, and incomplete fulfilment of sexual need than did Danish women with uncircumcised partners) ( $n = 5552$  (2573 men, 2979 women)). Interestingly, some passages in Jewish commentary seem to say that circumcision reduces sexual pleasure for both men and women. See, e.g., LEONARD B. GLICK, MARKED IN YOUR FLESH: CIRCUMCISION FROM ANCIENT JUDEA TO MODERN AMERICA 32-33 (2005) [hereinafter GLICK, MARKED IN YOUR FLESH]; MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED 609 (Shlomo Pines trans. 1963) ("The fact that circumcision weakens the faculty of sexual excitement and sometimes perhaps diminishes the pleasure is indubitable. For if at birth this member [the penis] has been made to bleed and has had its covering taken away from it, it must indubitably be weakened. The Sages, may their memory be blessed, have explicitly stated: *It is hard for a woman with whom an uncircumcised man has had sexual intercourse to separate from him.*") (emphasis in original) [hereinafter MAIMONIDES, GUIDE].

justifiable for parents to choose to vaccinate their offspring against measles, mumps, rubella, and other childhood diseases. Vaccinations almost never result in tissue loss, are usually effective given a good deal of herd immunity, have mostly minor side effects,<sup>29</sup> and serious side effects are rare.<sup>30</sup> Frequently, parents are not merely justified in vaccinating their sons and daughters against childhood diseases but have a moral and sometimes also a legal duty to do so.<sup>31</sup> It is also justifiable for parents to decide in consultation with a physician whether their child's tonsillitis warrants a tonsillectomy. This surgery involves the intentional loss of nonrenewable functional tissue but there are medical indications for performing it, whereas the concern here is with nontherapeutic circumcision of male minors.

I have been asked whether, if all human beings were born with a tail, it would be morally impermissible to cut off the tail entirely. The answer turns partly on whether the tail consists of nonrenewable functional tissue. Actual "true" human tails are nonrenewable tissue made up of nerves, striated muscle, blood vessels, and fatty and connective tissue covered by skin.<sup>32</sup> Because they have no function, are only remnants of embryonic tails, and often cause adverse psychosocial effects, it is morally permissible to remove them surgically. But suppose that hypothetical human tails have functions similar to those of dogs' and cats' tails: maintaining balance and communicating fear, hostility, interest, and excitement. If that were the case, it would not be morally permissible to cut off tails of minors without medical indication. Or, differently, suppose that hypothetical human tails have no functions but some humans quite like them and would regret their surgical removal. The affection and regret provide reasons for saying that the norm of bodily integrity is strong enough that any decision on surgery should be postponed until a tail-bearing human attains majority—provided that it is difficult, if not impossible to create a substitute tail

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29. See, e.g., Michael Eisenstein, *An Injection of Trust*, 507 NATURE S17, S17 (Mar. 6, 2014) (arguing that vaccination programs are a success story); Roland Pierik, *Mandatory Vaccination: An Unqualified Defence*, J. APPLIED PHIL. 1, 1 (2016) (arguing that vaccination should not be an area of parental choice but a legal obligation).
30. Margaret Maglione et al., *U.S. Vaccines Deemed Extremely Safe, with Serious Side Effects Rare Among Children*, RAND CORP., [https://www.rand.org/pubs/research\\_briefs/RB9799.html](https://www.rand.org/pubs/research_briefs/RB9799.html) (last visited Dec. 12, 2017).
31. See Pierik, *supra* note 29, at 11.
32. True (vestigial) human tails lack bone, cartilage, and spinal cord. They differ from human pseudotails, which are stumpy lesions such as lipomas or anomalous protruding coccygeal vertebrae. Some surgeons believe that the line between true tails and pseudotails is harder to draw than is commonly thought. See e.g., Deepak Kumar Singh et al., *The Human Tail: Rare Lesion with Occult Spinal Dysraphism – A Case Report*, 43 J. PEDIATRIC SURGERY E41, E42 (2008).

of the same kind. Here nonrenewability could suffice to make decaudation morally impermissible.

In my view, existing efforts to construct a tissue loss argument fall short because they do not address the moral permissibility of intentionally causing the loss of nonrenewable functional tissue in a range of examples. The point of the five examples below is to test our considered moral judgments about such examples and about nontherapeutic circumcision. The underlying method aims for coherence in a set of considered moral judgments, a set of moral norms, and a set of background theories.<sup>33</sup> The moral judgments are considered moral intuitions about particular cases. The moral norms pertain to bodily integrity and autonomy. The background theories explore why persons engage in certain practices affecting the human body, such as surgeries, religious rituals, and cultural body modifications. This method is used in the balance of this Article.

To forestall misunderstanding, if there is such a thing as a “true” moral, political, and legal theory of nontherapeutic circumcision, wide reflective equilibrium does not suffice for having found it, for one might have converged in error. Nor is wide reflective equilibrium indispensable for the moral components of this approach, because one might have arrived at those components without having developed sound background theories. Still, convergence in wide reflective equilibrium is a strong reason for accepting the moral components of the theory advanced here.

In the first three examples, surgical procedures are commonly regarded as morally permissible even though the reasons are often predominately psychosocial rather than medical.

(1) Ankyloglossia (more commonly known as tongue-tie) is a congenital condition of the lingual frenulum that restricts the movement of the tongue, ranging from mildly to completely.<sup>34</sup> This condition is surgically correctable with only a minor loss of tissue.<sup>35</sup>

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33. This method is known as wide reflective equilibrium. See Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256 (1979) (articulating and defending this method). Bioethicists disagree over wide reflective equilibrium. Compare Peter Nichols, *Wide Reflective Equilibrium as a Method of Justification in Bioethics*, 33 THEORETICAL MED. & BIOETHICS 325 (2012) (rebutting critiques of the method), with Carson Strong, *Theoretical and Practical Problems with Wide Reflective Equilibrium in Bioethics*, 31 THEORETICAL MED. & BIOETHICS 123 (2010) (critiquing the method). In my estimation, Nichols is more persuasive than Strong, but I acknowledge that debate exists.

34. *Tongue-tie*, AMERICAN ACADEMY OF OTOLARYNGOLOGY-HEAD AND NECK SURGERY, available at <http://www.entnet.org/content/tongue-tie-ankyloglossia> (last visited Nov. 22, 2017).

35. *Id.* (frenectomy/frenulectomy). If the frenulum is merely divided (i.e. a frenotomy/frenulotomy), there might be no loss of tissue. See STEDMAN'S MEDICAL DICTIONARY 620 (25th ed. illustrated, 1990), *s.v.* “frenotomy.”

Failure to correct this condition sometimes results in difficulties with feeding and speech, though disagreement exists over the benefits of corrective surgery compared to other therapies.<sup>36</sup>

(2) Cleft lip is a congenital condition that can affect feeding and speech.<sup>37</sup> It is surgically correctable with minor tissue loss.<sup>38</sup> Left uncorrected, it may have adverse psychosocial as well as physical effects.<sup>39</sup>

(3) Polydactyly is a congenital condition in which there is one or more extra fingers or toes.<sup>40</sup> It is correctable by minor to moderate surgery that results in the loss of the supernumerary fingers or toes.<sup>41</sup> Without surgery, the individual might have trouble grasping objects or

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36. See, e.g., Phoebus Tsaousoglou et al., *Diagnosis and Treatment of Ankyloglossia: A Narrative Review and a Report of Three Cases*, 47 *QUINTESSENCE INT'L* 523, 532 (2016) (reporting “controversy” over “diagnosis” and “therapy”); Sivakumar Chinnadurai et al., *Treatment of Ankyloglossia for Reasons Other than Breastfeeding: A Systematic Review*, 135 *PEDIATRICS* e1467, e1467 (2015) (concluding that “[d]ata are currently insufficient for assessing the effects of frenotomy on nonbreastfeeding outcomes that may be associated with ankyloglossia”).

In regard to ankyloglossia and all other cases discussed here, the citations and information supplied are only enough for readers to have some comparative basis for assessing possible medical indications. In dealing with actual patients, a health care provider has to decide what to do based on a particular patient’s history, presentation, laboratory work, radiologic findings, other information, and the provider’s informed clinical judgment. *Id.* at e1472.

37. Raj M. Vyas & Stephen M. Warren, *Unilateral Cleft Repair*, 41 *CLINICS PLASTIC SURGERY* 165, 168, 171 (2014).
38. *Id.* For lesser forms of cleft lip and their repair, see Shunsuke Yuzuriha & John B. Mulliken, *Minor-Form, Microform, and Mini-Microform Cleft Lip: Anatomical Features, Operative Techniques, and Revisions*, 122 *PLASTIC & RECONSTRUCTIVE SURGERY* 1485, 1486-87 (2008).
39. Studies seem to arrive at different conclusions and are not always clear on whether their subjects have, or had, only a cleft lip (“CL” or “CLO”) rather than a cleft lip palate (“CLP”). See, e.g., Dorthe Almind Pedersen, *Psychiatric Diagnoses in Individuals with Non-Syndromic Oral Clefts: A Danish Population-Based Cohort Study*, 11 *PLOS ONE* 1 (2016) (attesting to some psychological/psychiatric effects only for CLP, not cleft lip CL alone); Orlagh Hunt et al., *The Psychosocial Effects of Cleft Lip and Palate: A Systematic Review*, 27 *EUR. J. ORTHODONTICS* 274 (2005) (stating that few psychosocial problems seem related to CLP); Zoe E. Berger et al., *Coping with a Cleft: Psychosocial Adjustment of Adolescents with a Cleft Lip and Palate and Their Parents*, 46 *CLEFT PALATE-CRANIOFACIAL J.* 435, 442 (2009) (finding “little evidence of significant psychosocial adjustment difficulties in a group of adolescents born with a cleft”).
40. S. Malik, *Polydactyly: Phenotypes, Genetics and Classification*, 85 *CLINICAL GENETICS* 203, 203 (2014).
41. *Id.*



walking normally, and in obtaining gloves or shoes that fit properly.<sup>42</sup> Adverse psychosocial effects are common if the condition is left untreated.<sup>43</sup>

Now consider an example in which the proffered reason is entirely cosmetic. (4) Hyperdontia is a hereditary and maybe partly environmental condition in which a person has too many teeth.<sup>44</sup> It is correctable by removing supernumerary teeth and, if need be, rearranging the remaining teeth.<sup>45</sup> Without treatment, severe cases of hyperdontia can interfere with chewing and dental hygiene.<sup>46</sup> These could be medical indications for removal—especially if congenital craniofacial anomalies are present.<sup>47</sup> But consider a very mild case of hyperdontia – say, a single small extra tooth—in which the tooth can be left in place with no adverse medical or psychosocial consequences, and a barely discernible difference in appearance.<sup>48</sup> However, removing the tooth would result in a slightly better appearance. Pediatric dentists and parents might wonder if the slight cosmetic improvement would be enough to warrant removing the tooth, and such wondering does not amount to medical indication.

Finally, consider a situation in which the reasons for causing the loss of nonrenewable functional tissue are medical as well as cosmetic and psychosocial. (5) Skin is functional tissue. Ordinarily, skin is renewable, and its renewal is desirable. Yet, it is sometimes desirable to remove unattractive skin permanently. A congenital melanocytic nevus is a dark pigmented lesion on the skin.<sup>49</sup> It is superficial and benign.<sup>50</sup> Suppose that a newborn boy has a small (1.5 cm) nevus on his thigh that is both superficial and benign. It poses no current threat to his health—but it will grow larger as his body develops. Most

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42. *Id.*

43. *Id.*

44. Peter Proff et al., *Problems of Supernumerary Teeth, Hyperdontia or Dentes Supernumerarii*, 188 ANNALS OF ANATOMY 163, 163-164 (2006). See also Jorge Cortés-Bretón Brinkman et al., *Nonsyndromic Multiple Hyperdontia in a Series of 13 Patients: Epidemiologic and Clinical Considerations*, 130 J. AM. DENTAL ASS'N e16, e16 (June 2012).

45. J. Foley, *Surgical Removal of Supernumerary Teeth and the Fate of Incisor Eruption*, 1 EUR. J. PAEDIATRIC DENTISTRY 35, 35 (2004).

46. Brinkman et al., *supra* note 44.

47. *Id.*

48. Brinkman et al. required a minimum of three extra teeth for their study. *Id.* at e17. Even with three extra teeth, “[m]ultiple hyperdontia is usually diagnosed in the course of routine examination as a chance radiographic finding without any associated pathology.” *Id.* at e23.

49. Valerie B. Lyon, *Congenital Melanocytic Nevi*, 57 PEDIATRIC CLINICS N. AM. 1155, 1155 (2010).

50. *Id.*

pediatricians and dermatologists, and likely most parents, would see cosmetic and possibly psychosocial reasons to remove the lesion. But the nevus can indicate an “increased risk of malignancy” and even “transform into melanoma” later in life.<sup>51</sup> It is the medical risk of the condition that tips the scales in favor of removing the lesion. The nevus, if excised, will not come back; it is nonrenewable tissue, and the point of the surgery is to get rid of it. Removing the nevus is morally permissible, though watchful waiting could also be reasonable in some circumstances.<sup>52</sup>

None of these examples is completely analogous to nontherapeutic circumcision. The point of introducing them is to tease out the roles of medical, cosmetic, and psychosocial reasons for surgeries that remove nonrenewable functional tissue. All five cases involve physical abnormalities or anomalies. There is some medical justification in the first three cases, even if adverse psychosocial effects are the laboring oar. A very mild case of hyperdontia is a closer call if there is just one extra tooth that is small and inconspicuous, and does not interfere with chewing or speaking; case (4) is wholly cosmetic. Case (5) has medical as well as cosmetic and psychosocial justifications.

Nevertheless, it is essential to keep in mind that an intact penis is not physically abnormal or anomalous. Thus, unlike surgical intervention in the other cases, circumcision does not aim to correct a physical abnormality or anomaly. Perhaps circumcision is most akin to the interventions in the other cases where the parents’ chief motivation for intervening surgically is to reduce psychosocial harm resulting from the appearance of the child’s body. These five examples may somewhat reduce the strength of the tissue loss argument against nontherapeutic circumcision. Still, the above examples leave that argument with significant force.

## VI. A GENITAL SALIENCE ARGUMENT

The primary meaning of “salience” is physical prominence.<sup>53</sup> A secondary meaning is strikingness.<sup>54</sup> My argument considers interfering with a child’s genitals to have a salience compared to interference in the absence of a medical indication with many other parts of a child’s body. All else being equal, interfering with a child’s genitals is generally

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51. *Id.*

52. *Id.* at 1167 (“Observation without removal is warranted for benign-appearing small congenital nevi. . . or in cases where self-examination over a lifetime is feasible. . .”).

53. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2003 (Philip Babcock Gove ed., Merriam-Webster, Springfield, MA, 2002), *s.v.* “salience,” sense 1a [hereinafter WEBSTER’S DICTIONARY].

54. *Id.*, sense 1b.

worse than interfering with other parts of the child's body. With regard to the human body, salient parts are socially important and valued, and are often considered striking or tied to a person's sense of identity. A person's face, hair, genitals, skin color, and perhaps hands are usually salient. A person's wrists, elbows, knees, and perhaps feet are usually not salient. Other visible body parts, such as the neck and the umbilicus, lie somewhere on a spectrum between salient and not salient. Rarely are internal organs on the spectrum at all.

It requires some stage-setting to explain why the argument of this part is better framed in terms of "genital salience" than the more frequent locution "genital autonomy." The basic point is that genitals are not the sort of thing that can be autonomous, but they can be salient. Male genitals, and especially the penis, are salient in most societies without reference to circumcision, but they can be more salient if circumcision practices and ceremonies draw even more attention to the penis.<sup>55</sup> First, there is the obvious point that males have a penis and females do not. In societies where men are considered the dominant sex, male genitals, and especially the penis, have a different and usually higher social status than female genitals.<sup>56</sup> Second, males generally see and perhaps evaluate their penis daily in washing, urinating, and dressing.<sup>57</sup> Females would have to go to more trouble to look at their vulva on a daily basis. Third, penile social and psychological primacy is reflected in language. The primary meaning of "salience" lies specifically in "projection" or "protrusion."<sup>58</sup> There are many words for "vulva" and "vagina." There are also many words for "penis." Some of them are euphemisms ("member") and others are vulgar ("dick") or derogatory ("dumb-stick"). Most humor finds expression in language, and jokes about penises probably outnumber jokes about vulvas or vaginas. This list is not exhaustive.

With reference to circumcision, the salience of the male genitals, and especially the penis, is apparent in many gendered ways. First, according to a respected scholar, the "covenantal mark" on Jewish males indicates under "rabbinic Judaism" that "the Jewishness of

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55. *See Male Circumcision: Global Trends and Determinants of Prevalence, Safety and Acceptability* WORLD HEALTH ORGANIZATION & JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, [http://apps.who.int/iris/bitstream/10665/43749/1/9789241596169\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/43749/1/9789241596169_eng.pdf) (last visited Nov. 22, 2017).
56. For a downside of this point, see Annie Potts, *The Man with Two Brains: Hegemonic Masculine Subjectivity and the Discursive Construction of the Unreasonable Penis-Self*, 10 J. GENDER STUD. 145 (2001).
57. Thomas J. Ritter, *Foreword I*, in CIRCUMCISION: THE PAINFUL DILEMMA vii, vii (Rosemary Romberg ed., 1985) (opining that a man "cannot fail to associate with it [his penis] emotions, reminiscences, and possible fantasies" owing to "its frequent perusal").
58. WEBSTER'S DICTIONARY, *supra* note 53, at 2003, *s.v.* "salience," sense 1a; see also *id.*, sense 2, "a striking point or feature."

women is different from . . . and is of a lesser kind than the Jewishness of men. The absence of circumcision bespeaks their second-tier status.”<sup>59</sup>

Second, though cutting practices in Islam are variable across time and place, some societies celebrate the circumcision of boys “with great pomp” whereas the genital cutting of girls proceeds “without festivities.”<sup>60</sup>

Third, in some groups circumcision involves contrasts between joyfully welcoming a new male and circumcising him, or between celebrating the arrival of a new male and acting aggressively toward him, or both.<sup>61</sup> Anyone who has attended a bris or seen a video of one will perceive the warmth that usually greets the birth of a new son into the family and into a wider community, which to the eyes of some can seem to comport oddly with cutting off part of his penis.<sup>62</sup>

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59. SHAYE J. D. COHEN, WHY AREN'T JEWISH WOMEN CIRCUMCISED? 111 (2005) [hereinafter COHEN, JEWISH WOMEN].
60. A. J. Wensinck, *Khitān*, in 4 E. J. BRILL'S FIRST ENCYCLOPEDIA OF ISLAM 1913-1986, at 956, 957 (1987). Diacritical marks on Arabic common nouns transliterated into the Roman alphabet follow LENA SALAYMEH, THE BEGINNINGS OF ISLAMIC LAW: LATE ANTIQUE ISLAMICATE LEGAL TRADITIONS (2016) [hereinafter SALAYMEH, ISLAMIC LAW], unless the title of or a direct quotation from the source uses a different method. *See also* Kathryn Kueny, *Circumcision (Khitān)*, in 1 MEDIEVAL ISLAMIC CIVILIZATION: AN ENCYCLOPEDIA 156, 157 (2006) (“Ibn Ishaq mentions girls were also circumcised, but in less celebratory fashion.”). The celebratory difference still seems to exist. NATHAL M. DESSING, RITUALS OF BIRTH, CIRCUMCISION, MARRIAGE, AND DEATH AMONG MUSLIMS IN THE NETHERLANDS 76 (Leuven, Belgium, Peeters, 2001) [hereinafter DESSING, RITUALS].
61. *See, e.g.*, RONALD GOLDMAN, QUESTIONING CIRCUMCISION: A JEWISH PERSPECTIVE 57-61, 65-72 (1998) [hereinafter GOLDMAN].
62. *See, e.g.*, Melvin R. Lansky & Benjamin Kilborne, *Circumcision and Biblical Narrative*, in 16 THE PSYCHOANALYTIC STUDY OF SOCIETY: ESSAYS IN HONOR OF A. IRVING HALLOWELL 249 (Bruce Boyer & Ruth M. Boyer eds. 1991) (offering a psychoanalytic approach to such contrasts between welcoming and aggression). Lansky & Kilborne draw attention to violence in the circumcision narratives in the Hebrew Bible: *Genesis* 34 (killing duped self-circumcised Shechemites after the “rape” of Dinah); *Exodus* 4 (telling how Zipporah wards off God from killing Moses by wiping Moses’ genitals with his son’s bloody foreskin); *Joshua* 5 (holding a mass circumcision after wandering in the desert for forty years and subduing local Canaanite tribes); 1 *Samuel* 18-20 (David’s removing two hundred foreskins from dead Philistine warriors to win the hand of Michal). I take no position on the merits of psychoanalysis or the best interpretations of these biblical passages.

Whether there was some historical or religious transition from killing a son to circumcising him is far more complicated. “The rite [of circumcision] itself preserves the ancient notion that the deity desires the sacrifice of the whole child but is appeased with the offering up of the metonymic member and thus spares the life of the child.” *Jewish Circumcision*, *supra* note 1, at 732. *Exodus* 22:28b says, “You shall give Me the first-born among your sons” (Tanakh translation). *See* JON D.

Fourth, some contemporary scholars who oppose both circumcision and the cutting of female genitals take issue with those who would permit the former and disallow the latter.<sup>63</sup> To do so, they suggest, plays into cultural views that see women as more vulnerable than men, and regard painful rites of passage as better suited to masculine than feminine ideals.<sup>64</sup> This is not an exhaustive list.

Given that male genitals are usually covered in most cultures (except for romantic and sexual partners, physicians, and persons in locker rooms), their exposure and modification can seem striking and interesting, even religiously important.<sup>65</sup> In the covenant of circumcision (*brit milah*) in *Genesis*, removal of the foreskin is striking in part because it is done only to males and has associations with fertility.<sup>66</sup> In recent years, some people assimilate circumcision to child abuse, and sometimes even the sexual abuse of male minors.<sup>67</sup> The assimilation is debatable, because ordinarily child abusers and sex abusers intend to harm others or are indifferent to whether their actions harm others, whereas parents and circumcisers ordinarily intend to benefit male minors.

Some individuals hold that performing surgery on children born with physical intersex conditions is morally wrong.<sup>68</sup> Once it became possible to surgically “normalize” the genitals of these children in either a predominantly male or a predominantly female direction, when those children grew up they did not always like what their parents had

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LEVENSON, THE DEATH AND RESURRECTION OF THE BELOVED SON: THE TRANSFORMATION OF CHILD SACRIFICE IN JUDAISM AND CHRISTIANITY (1993), for a remarkable study of this biblical passage and its ramifications.

Even if Judaism has trailing clouds of earlier aggression and violence, this does not entail that contemporary Jews have aggressive or violent attitudes in circumcising their sons.

- 63. *E.g.*, GOLDMAN, *supra* note 61, at 65-77.
- 64. Brian D. Earp & Robert Darby, *Circumcision, Sexual Experience, and Harm*, 38 U. PA. J. INT'L L. ONLINE (2017) (published April 3, 2017), <http://pennjil.com/2017-penn-jil-online-symposium-circumcision-in-germany> (last visited Dec. 22, 2017).
- 65. See HOWARD EILBERG-SCHWARTZ, THE SAVAGE IN JUDAISM: AN ANTHROPOLOGY OF ISRAELITE RELIGION AND ANCIENT JUDAISM 141-76 (1990).
- 66. *Genesis* 17:9-14; see COHEN, JEWISH WOMEN, *supra* note 59, at 8-13 (discussing the covenant and its sign).
- 67. Michael Benatar & David Benatar, *Between Prophylaxis and Child Abuse: The Ethics of Neonatal Male Circumcision*, in DAVID BENATAR, CUTTING TO THE CORE: EXPLORING THE ETHICS OF CONTESTED SURGERIES 23, 23, 25 (2006) (describing and criticizing this view) [hereinafter BENATAR, CUTTING].
- 68. See Alice Domurat Dreger, “Ambiguous Sex”—or Ambivalent Medicine? *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CTR. REP. 24 (May-June 1998) (exploring some of the ethical issues).

consented to on their behalf.<sup>69</sup> The disaffected children, once grown, sometimes protested that there could be more than two sexes or genders, and that it should have been left to them to decide upon attaining adulthood what, if anything, should be done to their genitals.<sup>70</sup>

Salience straddles the line between fact and value. The salience of the penis is partly a fact—though a psychological or social fact (rather than a “brute” fact, such as that the element astatine is extremely rare). But the salience of the penis is partly value-laden. For instance, if the penis is more salient than the vulva, if part of that salience comes from “pruning” the penis in circumcision to promote fertility, and if fertility is highly prized, then the salience of the penis is partly a value.<sup>71</sup> The genital salience argument to be advanced momentarily does not violate Hume’s Law: no “ought” from an “is” and, more broadly, no value statement from a statement of pure fact.<sup>72</sup>

A common label—“genital autonomy”—for the argument I have in mind is a misnomer, because genitals are not and cannot be autonomous on their own. Nonetheless, one advantage of this label is to underscore the eventual autonomy of minor children, their right to bodily integrity while minors, and their need for protection from potentially harmful practices during their minority. The common label reflects, then, a belief that no nontherapeutic surgery should be performed on the genitals of children born with physical intersex conditions until they are mature enough to make a decision of their own. The point here is not to assimilate distinguishable cases but to stress the salience of

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69. Merle Spriggs & Julian Savulescu, *The Ethics of Surgically Assigning Sex for Intersex Children*, in BENATAR, CUTTING, *supra* note 67, at 79, 81 (noting that “[o]pposition to ‘normalizing’ surgery . . . has been expressed by patient advocacy groups and through the personal testimony of patients who are not happy with the way their condition has been managed”). See also JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL 9-17 (2000) (explaining how a botched circumcision led to gender-altering surgery); David Reimer, 38, *Subject of John/Joan Case*, N.Y. TIMES (May 12, 2004), <http://www.nytimes.com/2004/05/12/us/david-reimer-38-subject-of-the-john-joan-case.html> (relating how Reimer’s star-crossed life led to suicide).
70. Alyssa Connell Lareau, Note, *Who Decides? Genital-Normalizing Surgery on Intersexed Infants*, 92 GEO. L.J. 129, 130-31 (2003) (arguing that it is a mistake to seek better informed-consent standards for parents when the underlying issue is “[w]hether parents have the legal right to consent to surgery on their [intersex] infants that is irreversible, essentially cosmetic, and most often medically unnecessary”).
71. Howard Eilberg-Schwartz, *Why Not the Earlobe?*, 17 MOMENT 28, 29 (Feb. 1992), argues that circumcision in the Hebrew Bible has many of the same functional meanings that it does in “African circumcision rites: fertility, virility, maturity and genealogy.”
72. DAVID HUME, A TREATISE OF HUMAN NATURE 469 [1739] (L. A. Selby-Bigge ed., Oxford, Clarendon Press, 1960) (bk. III, pt. I, sec. I).

human genitals, especially (but not only) in the context of nontherapeutic circumcision.

According to my genital salience argument, any surgical change without medical indication to a child's genitals that affects their appearance, function, morphology, or control violates the child's right upon attaining majority to determine the appearance, function, morphology, and control of his or her genitals. While a boy is a minor, his right to autonomy over his genitals is held in trust for the benefit of the child. The right is not for the benefit of the parents or the parents' community. The trustees of this right-in-trust are the child's parents. If they are unable or unwilling to defend and exercise the right for the child's sole benefit, someone else or the state must become a successor trustee. The trustee must exercise the child's right so as to yield as open a future as possible for the child in relation to his or her own genitals.<sup>73</sup> An important reason for saying that such a right exists is that, owing to the vulnerability of infants and young children, they need protection against those who might not have their best interest at heart, or whose bias might interfere with discerning their best interests.

Previous attempts to state a careful genital salience argument do not, I suggest, address a range of practical and theoretical concerns, line-drawing issues, and problems with Feinberg's idea of an open future. For starters, it is useful to distinguish two practical concerns reflected in the genital salience argument. One concern, I argue, is to prevent inappropriate touching of a child's genitals, especially a touching that is or appears to be sexual in nature. Of course, such touching runs afoul of the control component of the argument. Infants and young children need to be given baths and have their diapers changed. Some of these activities involve touching children's genitals in a nonsexual way. However, massaging a baby boy's penis to produce an erection or caressing a baby girl's clitoris is wrong.

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73. I disagree with the extremely broad "right to an open future" defended by Feinberg, *The Child's Right to an Open Future*, *supra* note 23. Such a claim-right would severely restrict the liberty-right of parents to raise their children in a particular religion. Claudia Mills, *The Child's Right to an Open Future*, 34 J. SOC. PHIL. 499 (2003), gives decisive reasons for holding that it is neither possible nor desirable to supply children with a future that is as "open" as Feinberg seeks. But Mills overlooks circumcision. Far from being a case like religious education or music lessons where options are only "more or less encouraged or discouraged, fostered, or inhibited," circumcision is a case in which the option is, in Mills's language (*Id.* at 501), "properly viewed as open or closed." See also Robert J. L. Darby, *The Child's Right to an Open Future: Is the Principle Applicable to Non-Therapeutic Circumcision?*, 39 J. MED. ETHICS 463, 463 (2013) (arguing that nontherapeutic circumcision violates the child's right to an open future and is "thus objectionable from both an ethical and a human rights perspective").

In some ritual circumcisions, the mohel manipulates the penis to produce an erection to make the organ easier to work with.<sup>74</sup> Jewish groups would object to any insinuation that the ritual involves any inappropriate sexual touching.<sup>75</sup> The objection is, I think, well taken. However, some outsiders could perceive the situation differently. Their different perceptions are reflected in the fact that some organizations, such as MOGiS in Germany,<sup>76</sup> regard circumcision as akin to sexual abuse.<sup>77</sup>

The other practical concern addresses unnecessary surgeries on children's genitals. Such surgeries run afoul of the appearance, function, or morphology components of the genital salience argument. Some surgeries are necessary. Accidents are one cause of damage to boys' genitals, and sometimes surgery is the only way to repair the damage. Some developmental genital anomalies and defects are surgically correctable, as the following examples indicate.

Hypospadias is a defect in which the urethra does not travel closed from base to tip but instead opens on the underside of the penis at one or more points.<sup>78</sup> This condition, depending on its exact location, can make it difficult or impossible for a boy to urinate standing up without urinating on his fingers, scrotum, or thighs. Granted, the boy can sit down. But in some circumstances doing so is culturally awkward or draws unwanted attention.

Chordee is a form of penile curvature in which the glans of the penis angles, usually downward, at the junction of the shaft and the glans.<sup>79</sup> If chordee is mild, it may be noticeable on erection but not when the

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74. JACOB SNOWMAN, *THE SURGERY OF RITUAL CIRCUMCISION* 28-29 (L. V. Snowman, London: Initiation Society 3d ed., 1962) (1904).
75. See, e.g., World Jewish Congress, *World Jewish Congress Protests Swedish, Danish Doctors' Assault on Circumcision*, (Jan. 27, 2014), <http://www.worldjewishcongress.org/en/news/world-jewish-congress-protests-swedish-danish-doctors-assault-on-circumcision> (protesting a Danish medical group that stated "non-medical circumcision of boys amounts to abuse and mutilation").
76. MOGiS is an association of victims of sexual abuse. The acronym is short for MissbrauchsOpfer gegen InternetSperren (Abuse Victims against Blocking Access to the Internet). MOGiS holds that all child pornography on the Internet should be deleted rather than merely blocked. MOGiS, About Us, *Wer Wir Sind* [Who We Are], MOGiS e.V., <https://mogis-verein.de/wer-wir-sind> (last visited June 26, 2017).
77. MOGiS, About Us, *supra* note 76.
78. Warren T. Snodgrass & Nicol Corbin Bush, *Hypospadias*, in 4 CAMPBELL-WALSH UROLOGY, *supra* note 1, at 3399 (providing a thorough discussion).
79. For a brief discussion of congenital curvatures including chordee, see Kurt A. McCammon et al., *Surgery of the Penis and Urethra*, in 1 CAMPBELL-WALSH UROLOGY, *supra* note 1, at 907, 939-41.



penis is flaccid.<sup>80</sup> Hypospadias and chordee are surgically correctable.<sup>81</sup> There may be medical as well as cosmetic and psychosocial reasons for operating.<sup>82</sup>

Beyond these examples, there is a line-drawing issue raised by the genital salience argument. Consider congenital penile torsion, which is a rotational anomaly of the penile shaft on its longitudinal axis, usually in a counterclockwise direction.<sup>83</sup> If the condition is severe—defined as greater than 90 degrees off the midline—degloving surgery is warranted and, if necessary, a derotational dartos flap generally solves the problem.<sup>84</sup> Penile torsions between 45 and 90 degrees are “mild” and may not require any surgical intervention.<sup>85</sup> One line-drawing issue arises if the rotational anomaly is, say, 20 or 30 degrees off the midline and parents ask for surgical correction because of “cosmetic appearance and concerns of future dysfunction.”<sup>86</sup> The point is that it is hard to know where to draw the line between defensible and unnecessary repair of penile torsion.

Unsurprisingly, the trustees’ stewardship of the child’s anticipatory autonomy right-in-trust to bodily integrity raises both theoretical and practical issues. At a theoretical level, the scope of an anticipatory autonomy right to an open future is, as Claudia Mills argues, problematic.<sup>87</sup> It is hard to know what it could mean to “maximize” an open future, because some choices made now will or might foreclose other choices, either now or later. Furthermore, many things besides a boy’s control over his genitals go into an open future. Education, sports,

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80. *Id.*

81. *Id.*

82. *Id.*

83. Palmer & Palmer, *supra* note 4, at 3377-78, give a brief account of penile torsion. For more detail, see Egemen Eroglu & Gokhan Gundogdu, *Isolated Penile Torsion in Newborns*, 9 CANADIAN UROLOGY ASS’N J. E805, E805 (2015) (noting that penile torsion is often associated with other penile anomalies but even without such association 40 out of 1,000 newborns in their study exhibited some torsion) [hereinafter Eroglu & Gundogdu].

84. *Id.* Akram Mohammed Elbatarny & Khalid Ahmed Ismail, *Penile Torsion Repair in Children Following a Ladder Step: Simpler Steps Are Usually Sufficient*, 10 J. PEDIATRIC UROLOGY 1187, 1188 (2014), recommend trying the simplest step first and proceeding to more complicated steps only if needed, in the following order: degloving, skin realignment, dorsal dartos flap, and corporopexy. The 25 patients in their study had penile torsion ranging from 30 to 180 degrees, and some had comorbid conditions such as hypospadias or meatal stenosis. Residual torsion after treatment was 15 degrees or less.

85. Eroglu & Gundogdu, *supra* note 83, at E805.

86. *Id.* at E806.

87. Mills, *supra* note 73, at 500.

music, art, religious instruction, and moral upbringing—all of these and more affect a boy's future. It is not evident how to compare an open future in one or more of these areas with an open genital future.

At a practical level, it can be hard to say whether the child's right-in-trust with respect to his genitals requires the trustee to authorize surgery, refuse to authorize surgery, or leaves the choice to the trustee's discretion. Consider the differences between cases of physical intersex conditions, severe hypospadias, modest chordee, and less than mild penile torsion. Consider also cases in which early surgery is necessary to preserve a possible later choice for surgery that is important for the normal sexual functioning of the child once grown. Consider, too, probability cases—for instance, when there is a one in four chance that delaying surgery will negatively affect the child's later sexual functioning.

The genital salience argument recognizes that some urological surgeries will or could medically benefit a male minor. The repair of hypospadias, chordee, and possibly mild penile torsion are cases in point. None of these cases involves a physical intersex condition. Rather, in all of these cases, the aim is not to make a boy's abnormal or anomalous genitals look and function like a girl's genitals. The aim is to make them look and function like normal male genitals. The case of nontherapeutic circumcision is different because an intact penis is not physically abnormal or anomalous.

The genital salience argument, standing alone, makes a strong case in favor of an anticipatory right-in-trust for the benefit of a male minor not to be circumcised in the absence of a medical indication. Infants and young males are vulnerable to adult mishandling of their private parts. Religious and secular circumcisions sometimes turn out badly.<sup>88</sup> Accordingly, there is warrant for recognizing a moral anticipatory autonomy right-in-trust for male minors not to be circumcised without medical indication.

## VII. A PERMANENT MODIFICATION ARGUMENT

Susan Moller Okin argues persuasively that each individual has “the right to exit one's group of origin” and that this right “trumps any group right.”<sup>89</sup> By itself, Okin's argument scarcely precludes or restricts a supposed parental liberty-right to circumcise their male minors without medical indication. Having a symbol of religious affiliation on one's body does not prevent one from exiting the group of origin. Still, the symbol might cause a man who exits to feel distressed. The psychological aspects of having the symbol suggest that there would be something peculiar about a moral liberty-right, still less a moral claim-

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88. See *supra* text accompanying notes 9-13; see also *infra* Part IX.

89. Susan Moller Okin, “*Mistresses of Their Own Destiny*”: *Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205, 206 (2002).

right, for parents to place a permanent symbol of religious affiliation on boys' bodies. As we shall see, for practical purposes circumcision is permanent.

If parents do not have a moral liberty-right to control their son's religion forever, it is hard to see why they should be able to choose on his behalf a physical modification of his body which results in a permanent symbol of his religious identity, or his expected or assumed religious identity, in adulthood.<sup>90</sup> To underscore this point, I offer the following analogy.<sup>91</sup>

Imagine a society in which no group practices nontherapeutic circumcision. Imagine also that this society has equal numbers of Christians, Hindus, Buddhists, and nonreligious individuals. The groups have different symbols: a cross, a Sanskrit word pronounced "Om" (ॐ), a dharma wheel, and the word zero, respectively. Leaders of these groups have come up with a way of stamping each child, at age two, with a parentally-chosen symbol on the buttocks. The menu of buttock-stamps is limited to these four.

Buttock-stamping is painless. Parents intend the mark as a symbol of identity and pride. The mark is much more durable than a tattoo. The bottom of the mark is deep enough that dermabrasion cannot eliminate it, and the topmost portion of the mark is so near the surface of the skin that it is virtually impossible to tattoo over it. Buttock-stamps are effectively permanent.

Some persons over the age of fifteen in the buttock-stamp society change their religious affiliation, or non-affiliation, once or twice in a lifetime. These persons regard their buttocks symbol as an annoyance or worse. Some teenagers along with similarly-minded adults petition the group leaders to ban the practice of putting an indelible symbol on their buttocks.

The petitioners acknowledge that the stamping process does not hurt, and that no discriminatory practices based on the symbols exist. They contend that religious affiliation or the lack of it is not a fit subject for a permanent bodily modification. To them, belonging to a particular religion or none at all is a personal matter. They consider the symbol on their buttocks to be an indelible mark of origin. For those struggling with religious doubts or contemplating a switch from their current

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90. See Reinhard Merkel & Holm Putzke, *After Cologne: Male Circumcision and the Law. Parental Right, Religious Liberty or Criminal Assault?*, 39 J. MED. ETHICS 444, 447 (2013) (briefly stating the key intuition behind the permanent modification argument). If a physical modification were to disappear upon the child's attaining majority, the permanent modification argument would not apply.

91. Though I do not agree with R. M. Hare's utilitarianism, I am sympathetic to his occasional use of hypothetical examples that are rather more detailed than those offered by most other moral philosophers. See, e.g., R. M. Hare, *What Is Wrong with Slavery*, 8 PHIL. & PUB. AFF. 103, 111-13 (1979) (using the Juba and Camaica example).

status, or those negotiating multiple religious affiliations, that symbol can cause emotional confusion and distress.

The petitioners in the buttock-stamp society are concerned about being able to exit that part of their society which marks them for life, even if they reside in the same geographical area. They are even more concerned about preventing future members of their society from having placed on their buttocks a permanent mark of origin.

The buttock-stamp society is scarcely a perfect analogy, in part because no bodily modification is exactly like circumcision. The point of the analogy is to suggest how difficult it is to show that nontherapeutic circumcision is morally permissible. The permanent modification argument and the genital salience argument jointly have considerable strength. They help to make a case for a moral anticipatory autonomy right-in-trust for the benefit of male minors not to be circumcised until they are capable of making an autonomous decision of their own.<sup>92</sup>

It bears notice that the permanent modification argument pertains not only to the permanence of the change but also the means used to create that change. In particular, the means should not be unnecessarily dangerous to the boy being circumcised. The end of Part II remarked that parents are not necessarily morally blameworthy for having their newborn sons circumcised. But the situation would be different if, for example, parents knew that a dangerous method of circumcision would be used.

Consider an uncommon variant of Jewish circumcision known as *metzitzah b'peh*, in which the mohel uses his mouth to remove blood from the infant's newly circumcised penis.<sup>93</sup> This variant seems to have emerged in the second century C.E. and was common in some geographical areas even into the nineteenth century.<sup>94</sup> But by the mid to late nineteenth century it was known that a mohel infected with syphilis could transmit the disease to infants through direct orogenital suction, and today we know that a mohel infected with herpes simplex virus (HSV-1) can transmit the virus to infants.<sup>95</sup> It is hard to see how

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92. Important limitations on the permanent modification argument are that applying it to those stamped ZERO is inapposite and that extending it to secular practices of circumcision is problematic.

93. *Jewish Circumcision*, *supra* note 1.

94. *Id.*

95. GLICK, MARKED IN YOUR FLESH, *supra* note 28, at 45, 124, 127-28, 130-32, 137-38 (2005) (describing bacterial infections such as syphilis transmitted from mohel to male infant via *metzitzah b'peh*); Centers for Disease Control and Prevention, *Neonatal Herpes Simplex Virus Following Jewish Ritual Circumcisions that Included Direct Orogenital Suction – New York City, 2001-2011*, 61 MORTALITY & MORBIDITY WKLY REP. 405, 405 (2012) (describing HSV-1 and untyped HSV infections transmitted from mohel to male infant via direct orogenital suction).

one could justify imposing such risks of infection on newborns. It is now morally blameworthy for parents to have their infant sons to undergo circumcision *metzitzah b'peh* because it is needlessly dangerous to newborns.

### VIII. A GENDER EQUALITY ARGUMENT

Thus far I have articulated moral norms of bodily integrity and autonomy. I have also deployed a tissue loss argument, a genital salience argument, and a permanent modification argument that jointly and severally support a moral anticipatory autonomy right-in-trust for male minors not to be circumcised without medical indication. The three arguments are *direct* arguments for such a right. I now set out an *indirect* argument for such a right based on gender equality.

The indirect argument rests on the idea that male and female minors should, all else being equal, be treated the same so far as is possible given their obviously different external genitals.<sup>96</sup> The core of the argument is that if it is morally impermissible to remove some part of female external genitals, then it is morally impermissible to remove a corresponding part of male external genitals. Predictably, much depends on the word “corresponding.”

The gender equality argument takes us into new territory so far as circumcision, as understood in the Introduction, is concerned.<sup>97</sup> There, circumcision was defined in such a way that it applies only to males. We need to broaden our vocabulary in two ways in connection with this argument.

First, the terms “male genital cutting” (“MGC”) and “male genital alteration” (“MGA”) are not common at present but can be useful, for they apply not only to circumcision but also to other penile modifications.<sup>98</sup> To avoid question-begging, the term “male genital mutilation” (“MGM”) is not used here.

Second, the terms “female genital cutting” (“FGC”), “female genital alteration” (“FGA”), and “female genital mutilation” (“FGM”) apply to various forms of modifying the external genitals of girls and

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96. This idea may require refinement. Women and girls have historically not been, and currently are not, treated equally with men and boys. To rely on notions of “equal treatment” now, as opposed (say) to a notion of corrective justice, might continue to disadvantage women and girls by overlooking the historically embedded contexts of unequal treatment and the enduring effects of that treatment.

97. See *supra* text accompanying note 1.

98. J. Steven Svoboda & Robert Darby, *A Rose by Any Other Names? Rethinking the Similarities and Differences between Male and Female Genital Cutting*, in FEARFUL SYMMETRIES: ESSAYS AND TESTIMONIES AROUND EXCISION AND CIRCUMCISION 249, 259-264 (Chantal Zabus ed., Rodopi, Amsterdam and New York, 2008) [hereinafter Svoboda & Darby].

women.<sup>99</sup> Of these terms, “FGM” is undesirable because “mutilation” is obviously a value-laden word. Words such as “cutting” and “alteration” are neutral, or nearly so. However, the World Health Organization (“WHO”) has generally insisted on using “FGM” or sometimes “FGM/C.”<sup>100</sup> Although these last two acronyms may not be ideal, in order to report the WHO’s views accurately, it is frequently necessary to use “FGM” or “FGM/C.”

The most recent WHO Fact Sheet on FGM was published in February 2017.<sup>101</sup> It identifies four types of FGM.<sup>102</sup> Almost all of these types cover severe cutting of the female genitals, including partial or total removal of the clitoris, partial or total removal of the labia minora and/or the labia majora, and narrowing of the vaginal opening (infibulation).<sup>103</sup> These practices differ substantially from male circumcision.<sup>104</sup> Type 1 reads:

Often referred to as **clitoridectomy**, this is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals, and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris)).<sup>105</sup>

My focus here is confined to “the partial or total removal” of “only” the “prepuce,” which is said to be “very rare.”<sup>106</sup> It is this rare type that is pertinent for purposes of comparing it to circumcision.

Consider some similarities between the male prepuce (foreskin) and the female prepuce (clitoral hood). To begin with, they are embryological homologues: they along with other parts of the external genitals emerge from an undifferentiated genital tubercle prior to ten

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99. *Female Genital Mutilation*, WHO MEDIA CENTRE (updated Feb. 2017), <http://www.who.int/mediacentre/factsheets/fs241/en/> [hereinafter WHO Fact Sheet 2017].

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. The best classification of male genital cutting known to me is the seven types distinguished by Svoboda & Darby, *supra* note 98, at 259, 266. Their scale, inspired by the WHO classification, rests on the amount of foreskin tissue removed and ranges from nicking the foreskin to the complete denudation of the penis. *Id.* I disagree with some aspects of their classification that are not especially important here. Stephen R. Munzer, *The German Circumcision Controversy—And Beyond*, U. PA. J. INT’L L. ONLINE, <http://pennjil.com/the-german-circumcision-controversy-and-beyond/> (published Apr. 6, 2017, paginated version *available at* <https://ssrn.com.abstract=2947893>, at 28-29.) [hereinafter Munzer, *Beyond the German Circumcision Controversy*].

105. WHO Fact Sheet 2017, *supra* note 99 (bold type in original).

106. *See id.*

weeks gestation and are well formed at birth.<sup>107</sup> The total removal of the foreskin in male circumcision is comparable in degree to the total removal of the clitoral hood in female FGM/FGC, even though so-called female circumcision of this rare type “would excise less tissue than in a male circumcision.”<sup>108</sup> The partial removal of each is comparable in degree if corresponding portions of the foreskin and the clitoral hood are removed.

Anatomically, the clitoral hood and the foreskin consist partly of erogenous mucosal tissue that protects the glans of both the clitoris and the penis, respectively.<sup>109</sup> The clitoral hood supplies less lubrication for intercourse than the foreskin, but neither is the main source of lubrication for this purpose.<sup>110</sup>

Now consider some differences between the foreskin and the clitoral hood. The quantity of tissue removed in male circumcision as usually understood is almost always larger than the quantity of tissue removed in the total or partial removal of the clitoral hood.<sup>111</sup> Additionally, the clitoral hood drapes over the clitoris and its glans but typically does not fully surround them; rather, it commonly descends into the upper portion of the labia minora.<sup>112</sup> In contrast, the foreskin generally sur-

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107. See generally FRANK H. NETTER, ATLAS OF HUMAN ANATOMY Plate 393 (Ciba-Geigy Corp., Summit, NJ, 1990); Patricia A. Donohoue, *Disorders of Sex Development*, in NELSON PEDIATRIC SYMPTOM-BASED DIAGNOSIS 348, 350 (Figure 23.1) (Robert M. Kliegman et al. eds., 2018) (illustrating “differentiation of normal male and female genitalia during embryogenesis”); John M. Park, *Embryology of the Genitourinary Tract*, in 4 CAMPBELL-WALSH UROLOGY, *supra* note 1, at 2823.

108. Cold & Taylor, *supra* note 15, at 42.

109. *Id.* at 35, 38.

110. *Id.* at 39.

111. Cold & Taylor, *supra* note 15, at 34 (“Although the amount of genital tissue removed is variable, the penile prepuce is removed in nearly all male circumcisions, and the clitoral prepuce is removed in a Fourcroy grade 1 female circumcision . . .”). In addition, while the removal of the clitoral hood “would excise less tissue than in a male, this comparison cannot be used to justify” removing the clitoral hood. *Id.* at 42.

112. Cold & Taylor, *supra* note 15, at 37 (“The urogenital groove on the ventral surface of the clitoris prevents circumferential preputial development and results in the hood-like appearance of the clitoral prepuce. The urogenital groove of the clitoris eventually regresses and develops into the labia minora.”).

The description in this and the next two sentences of the text applies mainly to adult men and women and is intended to be as neutral as possible. But it may be that no description of male and female genitals is wholly neutral, which is one message of THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD (1990). The context of my description is an examination of nontherapeutic cutting of male and female prepuces. A description given by a sexologist, historian, anatomist, gynecologist, or urologist would have a different context.

rounds much if not all of the distal end of the penis in a flaccid state, and often still surrounds some of it in an erect state.<sup>113</sup>

Neither the foreskin nor the clitoral hood has precise metes and bounds, and anatomic variations exist across individuals of each sex.<sup>114</sup> Again, the penile frenulum is removed in most current circumcision practices, but it would require great skill to remove the clitoral frenulum because it is on the underside of the clitoris and seated against the body. That might explain why it is hard to find any reports of resecting the clitoral frenulum in the already rare practice of removing part or all of the clitoral hood in young girls.<sup>115</sup>

Further, male circumcision is in some respects easier than removing the clitoral hood on a female child, especially a very young child, because of the small size of the clitoris and prepuce.<sup>116</sup> It is beyond my competence to say whether a surgeon would need magnification and have to take exquisite care not to damage the clitoris or other structures in the vulva. The probability of a “successful” result would decline if a person without good medical training performed the procedure.

Moreover, even if adult men usually welcome direct stimulation of their glans penis, college textbooks on human sexuality often point out that some adult women find it uncomfortable to have their glans clitoris stimulated directly by a finger or a penis.<sup>117</sup> A “successful” partial or total removal of the clitoral hood might impinge on the sex life of some

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113. Wide variation exists in the genital anatomy of individual men and the genital anatomy of individual women. *See generally* ROBERT LATOU DICKINSON, HUMAN SEXUAL ANATOMY (Krieger Publ. Co., 1971) Though originally published in 1949 and dated in some ways, this book is still useful. Any line between unusual variations on the one hand and anomalies or abnormalities on the other is apt to be blurry.
114. On the penis, *see* Freedman and Hurwitz, *supra* note 9, at 245 (“Recognizing genital anomalies and judicious patient selection is the key to prevent complications” from circumcision); Ken McGrath, *Variations in Penile Anatomy and Their Contribution to Medical Mischief*, in CIRCUMCISION AND HUMAN RIGHTS 97 (George C. Denniston et al. eds., 2009) (discussing sebaceous glands, pearly penile papules, redundant foreskin, and other variations, aided by drawings and photographs).
115. *See supra* text accompanying notes 105-106.
116. Ann J. Davis, *Pediatric and Adolescent Gynecology*, in DANFORTH’S OBSTETRICS AND GYNECOLOGY 554, 554-55 (Ronald S. Gibbs et al. eds., 10th ed., 2008) (Figure 31.1); S. Jean Emans, *Office Evaluation of the Child and Adolescent*, in EMANS, LAUFER, GOLDSTEIN’S PEDIATRIC AND ADOLESCENT GYNECOLOGY 1, 2 (S. Jean Herriot Emans et al. eds., 6th ed., 2012) (Figure 1-1).
117. JANET SHIBLEY HYDE & JOHN D. DELAMATER, UNDERSTANDING HUMAN SEXUALITY 213 (12th ed. 2014) (“[s]ome women find direct stimulation of the clitoral glans to be painful in some states of arousal.”) For some of these women, they continue, stimulating the clitoral hood or either side of the clitoris is preferable. *Id.*



women because the clitoris is less protected and therefore more sensitive.<sup>118</sup>

The gender equality argument must confront at least three difficult questions. (1) Are the clitoral hood and the foreskin sufficiently corresponding to get the argument off the ground? (2) Is any argument that pairs the clitoral hood and the foreskin objectionable for other reasons? (3) Has the WHO collected enough evidence on *all* such practices to show that removing the clitoral hood is harmful? It is not possible here to answer any of these questions conclusively.

In grappling with the first question, remember that the gender equality argument is conditional: if it is morally impermissible to remove all or part of the clitoral hood, then it is morally impermissible to remove all or part of the foreskin. Embryologically and anatomically, the clitoral hood and the foreskin correspond to each other.<sup>119</sup> Functionally, they are similar but not identical.<sup>120</sup> Structurally, they differ in the quantity of tissue to be removed and in the degree of surgical expertise needed to remove it safely.<sup>121</sup>

At day's end, certainly they correspond to each other far better than any other female sexual part does to any other relevant male sexual part. Sufficient correspondence does not require embryological, anatomical, functional, or structural identity. A strong, but not conclusive, case thus exists for saying that the two structures are sufficiently corresponding. Of course, even if the two structures were insufficiently corresponding, it would not follow that it is morally permissible to remove either or both structures.

The second question asks whether pairing the clitoral hood with the foreskin is objectionable for other reasons. One possible reason is that comparing the removal of the clitoral hood to the removal of the foreskin is anti-Jewish. Shaye J. D. Cohen seems to entertain something like this reason in writing, “[w]hen Christians turned the non-circumcision of Jewish women into an anti-Jewish argument, they did so not because they were advocates of women’s rights but because they were eager to score points against their theological opponents.”<sup>122</sup> There is, or at least was, a theological debate between Judaism and Christianity on the religious merits of circumcision.<sup>123</sup>

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118. *Id.*

119. Munzer, *Beyond the German Circumcision Controversy*, *supra* note 104.

120. *Id.* at 28-33

121. *Id.* at 29-33 (concentrating on males); J. Abdulcadir et al., *Research Gaps in the Care of Women with Female Genital Mutilation: An Analysis*, 2015 BRIT. J. OBSTETRICS & GYNAECOLOGY 294 (2014) (concentrating on females).

122. COHEN, JEWISH WOMEN, *supra* note 59, at 92.

123. Cohen’s examination of this debate is insightful. *Id.* at 67-92.

Yet at a less lofty level it does not seem anti-Jewish to raise the possibility of an inconsistency or tension within Judaism, or perhaps Jewish law, of requiring circumcision for males but not allowing anything resembling circumcision for females. This less lofty level is reflected in Cohen's efforts to show that little to no evidence exists showing that Judaism ever practiced any form of FGC.<sup>124</sup> The Greek geographer Strabo (64? B.C.E.-24 C.E.) thought that Jews practiced some form of "excision" (not necessarily as defined by the WHO).<sup>125</sup> There is a strong argument that Strabo was mistaken.<sup>126</sup>

But evidence exists that the Beta Israel, of Ethiopian origin, have had a female excision practice in the modern period and that the practice continues to some extent in the present day.<sup>127</sup> Cohen ascribes the practice to their "Ethiopianness" rather than to their "Jewishness."<sup>128</sup> There is, of course, no warrant for using anti-Jewish sentiment to identify a possible inconsistency or tension as a means to discriminate against Jews. One must always be on guard against the use of legitimate questions as a means to advance discriminatory agendas.

The third question is whether the WHO has enough evidence that wholly or partially removing the clitoral hood is harmful. The WHO Fact Sheet of 2017 has a link to a WHO document that describes the short-term and long-term risks created by FGM.<sup>129</sup> The risks form a horrific parade of the adverse consequences of FGM/C types 1, 2, and 3. But the document says nothing about the health consequences of the "very rare" practice of removing *only* part or all of the female prepuce.<sup>130</sup> Perhaps the rarity of the practice is a reason for the omission. In the future it would be helpful to have such health information published.

It may be countered that this rare, mild type of FGM is not a human rights violation, especially because human rights recognized by international law need not be the same as moral human rights.<sup>131</sup> To evaluate the counter, consider why the WHO views FGM generally and

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124. *See id.* at 58-66 (sifting the evidence).

125. *Id.* at 59-60.

126. *Id.* at 59-65 (using writings of Philo of Alexandria (c. 25 B.C.E.-50 C.E.) against Strabo).

127. *Id.* at 60. Cohen accepts that the Beta Israel, also called Falasha or "black Jews" of Ethiopia, are Jews. *Id.* Many of them moved to Israel in the period 1984-1991. *Id.*

128. *Id.* at 60, 64.

129. WHO, *Health Risks of Female Genital Mutilation (FGM)*, [http://www.who.int/reproductivehealth/topics/fgm/health\\_consequences\\_fgm/en/](http://www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en/) (last visited June 20, 2017).

130. *Id.*

131. My gender equality argument puts in play only moral rights, not moral *human* rights (which would require further argument).

the partial or total removal of the female prepuce specifically to violate human rights and the rights of children. Both are “nearly always carried out on minors.”<sup>132</sup> They violate the “rights to health, security and physical integrity.”<sup>133</sup> They violate “the right to be free from torture and cruel, inhuman or degrading treatment.”<sup>134</sup> A great many forms of FGM violate these rights gravely, are done only to girls and women, and have serious health consequences.<sup>135</sup> However, that just means some things could be worse for a girl than to have her clitoral hood removed—not that its removal is defensible.

If someone claimed that boys currently experience the unpleasant aspects of nontherapeutic circumcision, an answer is that one does not achieve equal justice by treating girls and boys in more or less equally unjustifiable ways. The indiscriminate imposition of similar harms on both boys and girls is not equal justice. It might be roughly equal injustice, both morally and under international human rights laws.

I conclude that a strong, though indirect, case exists that, if it is morally impermissible to remove all or part of the female prepuce, then it is morally impermissible to remove all or part of the male prepuce. To this conclusion I add two brief points.

First, WHO FGM type 4 includes “all other *harmful* procedures” affecting female external genitals for “non-medical purposes.”<sup>136</sup> As examples, the Fact Sheet gives “pricking, piercing, incising, scraping and cauterizing the genital area.”<sup>137</sup> This language intimates that there might be a *harmless* form of, for example, pricking the clitoral hood. If there is such a form, it might support *hatafat dam brit*, a Jewish practice in which the penis of a male born without a foreskin is punctured in “the skin of the glans with a scalpel or needle” so as to “allow[] a drop of blood to exude.”<sup>138</sup> This practice is not circumcision but a circumcision-substitute.

Second, it is important to keep abreast of evolving FGC/FGA practices across the globe. A short article appeared in 2016 which reported that female “circumcision” in Indonesia “largely had involved a less drastic version of cutting, usually a surface scratch or nick,” and observed that Indonesian law defines female “circumcision” as “an act of scratching the skin that covers the front of the clitoris without

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132. WHO Fact Sheet 2017, *supra* note 99.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* (emphasis added).

137. *Id.*

138. *Jewish Circumcision*, *supra* note 1, at 732.

injuring the clitoris.”<sup>139</sup> The report does not say why some people and legislators adopted scratching the skin in this manner. An obvious possible answer is that they thought the ritual scratch tallied with Muslim tradition without inflicting pain or injury on girls. Of course, the WHO limits type 4 to “harmful procedures,” and it could say that the Indonesian practice described is not harmful.<sup>140</sup> If male “circumcision” were transformed into the making of a scratch that does not harm the penis, it might be morally unproblematic.

#### IX. ASSERTED MEDICAL BENEFITS OF NEONATAL CIRCUMCISION

It is important to address typical asserted medical benefits of or reasons for circumcising male newborns. In considering these supposed benefits and reasons, I have been counseled to pay special attention to the treatment of this matter provided online by the Mayo Clinic. The Mayo Clinic is one of the most highly respected medical centers in the United States; its main clinic is in Rochester, Minnesota.<sup>141</sup> The purpose of this examination is to assess evenhandedly the online position of the Mayo Clinic.

My discussion concentrates on nontherapeutic neonatal circumcision, for two reasons. First, this practice is far more common in the United States than the nontherapeutic circumcision of older boys and adult men. Second, one should avoid confounding factors in cases where medical indications exist for circumcising. Once this examination is complete, later parts of this Article will continue the analysis.

The relevant online document is titled “Circumcision (male)” and “Why it’s done” and is ascribed simply to the “Mayo Clinic Staff.”<sup>142</sup> The document consists of several paragraphs, only some of which are important enough to reproduce here. The first paragraph tells the

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139. Pam Belluck & Joe Cochrane, *Unicef Report Finds Female Genital Cutting to be Common in Indonesia*, N.Y. TIMES (Feb. 4, 2016), <http://nytimes.com/2016/02/05/health/indonesia-female-genital-cutting-circumcision-unicef.html> [hereinafter Belluck & Cochrane]. UNICEF tries to catalog the type of FGM/C per country, but the information on Indonesia is anecdotal and not catalogued by type. So it is hard to say whether Indonesia contributes to a possible trend toward less severe forms. See E-mail from Nicole Petrowski, consultant in the Data and Analytics section of UNICEF headquarters, to Jeremy Peretz, research assistant to Stephen R. Munzer (Feb. 25, 2016, 6:41 p.m. PDT) (on file with the author).

140. WHO Fact Sheet 2017, *supra* note 99.

141. W. BRUCE FYE, CARING FOR THE HEART: MAYO CLINIC AND THE RISE OF SPECIALIZATION (2015).

142. Mayo Clinic Staff, *Circumcision (male), Why It’s Done*, MAYO CLINIC, <http://www.mayoclinic.org/tests-procedures/circumcision/basics/why-its-done/prc-200113585> (last updated Feb. 20, 2015) [hereinafter Mayo].

reader that Jews, Muslims, and some indigenous peoples circumcise.<sup>143</sup> It continues: “Circumcision can also be a matter of family tradition, personal hygiene or preventive health care.”<sup>144</sup> One can infer from this statement that while family tradition could be a reason why some families circumcise, the Mayo article does not evaluate whether it is a *good* reason. Nor does it say whether the Mayo Clinic Staff thinks there is something medically desirable about such a tradition. Personal hygiene and preventive health care receive attention below.

The paragraph goes on to say that “[s]ometimes there’s a medical need for circumcision,”<sup>145</sup> such as unretractable foreskin. However, that is not pertinent to this Article, which is concerned with nontherapeutic circumcision. The paragraph ends with the observation that in regions of Africa “circumcision is recommended for older boys or men to reduce the risk of” STDs.<sup>146</sup> This observation is puzzling. Circumcision to reduce the risk of STDs would seem to be a medically prophylactic reason to perform the procedure. Yet the Mayo Clinic Staff says nothing about whether certain medical practices in Africa are useful for or even relevant to the United States or other developed countries.<sup>147</sup>

The second paragraph states that “[t]he American Academy of Pediatrics (AAP) says the benefits of circumcision outweigh the risks.”<sup>148</sup> This second paragraph does not say whether the Mayo Clinic Staff agrees or disagrees with the AAP.<sup>149</sup> Nor does it mention that the AAP position has met with heavy criticism.<sup>150</sup> It does add, though, that “[t]he AAP leaves the circumcision decision up to parents.”<sup>151</sup> This addition is odd. The AAP is a medical organization, and it says that the “benefits of circumcision outweigh the risks.”<sup>152</sup> If that is correct, then the AAP seems to be saying that the *medical* benefits outweigh the risks, in which case it is strange not to recommend that parents circumcise their healthy male newborns.

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143. *Id.*

144. *Id.*

145. *See id.*

146. *See id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *See e.g.*, Morten Frisch et al., *Cultural Bias in the AAP’s 2012 Technical Report and Policy Statement on Male Circumcision*, 131 PEDIATRICS 796, 798 (2013) (asserting AAP cultural bias compared to almost all European medical organizations that have a position on nontherapeutic neonatal circumcision) [hereinafter Frisch et al., *Cultural Bias*].

151. Mayo, *supra* note 142.

152. *Id.*

Perhaps one way to make sense of this tangle is that the AAP and possibly the Mayo Clinic Staff in mentioning the AAP believe that it is only by the slimmest of margins that the medical benefits of neonatal nontherapeutic circumcision outweigh the risks. If that is what the AAP and possible the May Clinic Staff believe, the perhaps they should say so.

Only in the third paragraph do we get to the heart of the matter. In setting forth the position of the Mayo Clinic Staff, I italicize two hedge words that appear in the indented quotation below: *might* and *can*. Sometimes hedge words are vital to avoid claiming more than it is possible to show. At other times, hedge words make it hard to ascertain how much confidence the authors have in what they write. Or perhaps hedge words have other uses. Readers will have to make up their own minds regarding hedge words used in the following passage:

Circumcision *might* have various health benefits, including:

- **Easier hygiene.** Circumcision makes it simpler to wash the penis. Washing beneath the foreskin of an uncircumcised penis is generally easy, however.
- **Decreased risk of urinary tract infections.** The overall risk of urinary tract infections in males is low, but these infections are more common in uncircumcised males. Severe infections early in life *can* lead to kidney problems later on.
- **Decreased risk of sexually transmitted infections.** Circumcised men *might* have a lower risk of certain sexually transmitted infections, including HIV. Still, safe sexual practices remain essential.
- **Prevention of penile problems.** Occasionally, the foreskin on an uncircumcised penis *can* be difficult or impossible to retract (phimosis). This *can* lead to inflammation of the foreskin or the head of the penis.
- **Decreased risk of penile cancer.** Although cancer of the penis is rare, it's less common in circumcised men. In addition, cervical cancer is less common in the female sexual partners of circumcised men.<sup>153</sup>

Let us take up these points in order.

Once the foreskin has become retractable, it is true that a circumcised penis is easier to wash than an uncircumcised penis.<sup>154</sup> At

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153. *Id.* (bold type and bullet points in original, italics added).

154. Erik P. Castle, *I'm Not Planning to Have my Newborn Circumcised. How Should I Care for his Uncircumcised Penis?*, <https://www.mayoclinic.org/healthy-lifestyle/infant-and-toddler-health/expert-answers/uncircu>

birth, the foreskin is almost always fused to the surface of the glans and is not retractable.<sup>155</sup> It becomes retractable without force generally between two and ten years of age.<sup>156</sup> During the period of unretractability, an uncircumcised penis is basically as easy to wash as a circumcised penis.

The Mayo Clinic Staff quickly tells the reader that washing an uncircumcised penis “is generally easy, however.”<sup>157</sup> How easy is that? Erik P. Castle, M.D., in a different part of the Mayo Clinic website, tells parents to teach their uncircumcised son to:

- Gently pull back the foreskin
- Clean beneath the foreskin with mild soap and water
- Rinse and dry beneath the foreskin thoroughly
- Pull the foreskin back over the head of the penis<sup>158</sup>

These instructions are not rocket science and are not burdensome to follow. The Mayo Clinic Staff’s “easier hygiene” rationale seems a weak reason for doing a surgical procedure.

What about the decreased risk of urinary tract infections (“UTIs”)? It is unclear what age range is presupposed in this portion of the document.<sup>159</sup> Is it birth to age four? Birth to age twelve? Birth to death? The article seems to be aimed at parents-to-be, which would suggest that birth to age four or thereabouts is the most plausible interpretation, and I adopt it here. Given that “overall risk” of UTIs in males “is low,”<sup>160</sup> it would help to know how much more common they are in uncircumcised young boys compared to circumcised young boys.

The Mayo Clinic Staff does not enlighten the reader on this point in its online article on circumcision. Nor does it mention any alternatives to circumcision in this context. In fact, physicians often

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mcised-penis/faq-20058327 (last visited Mar. 22, 2018) [hereinafter Castle].

155. Cold & Taylor, *supra* note 15, at 35. The prepuce separates from the glans over the years, as indicated in Figures 2 and 3. *Id.*

156. *Id.*

157. Mayo, *supra* note 142.

158. Castle, *supra* note 154 (bullet points and absence of punctuation in original).

159. Mayo, *supra* note 142.

160. *See id.*

treat UTIs successfully with an antibiotic.<sup>161</sup> Most infants tolerate an appropriate antibiotic well.<sup>162</sup> True, an antibiotic may not always work, in which case other antibiotics are available. A conservative approach would be to wait and see whether one's own infant ever has a UTI, to use an antibiotic if he has one UTI, and to consider circumcision if he has two or more UTIs. This approach assumes that, all else being equal, antibiotics pose less risk than circumcision; some might challenge this assumption.

The reader should pay careful attention to the final sentence, which states that “[s]evere infections early in life *can* lead to kidney problems later on.”<sup>163</sup> The reader should ask how often severe infections in early life occur, given that the incidence of UTIs is already “low.”<sup>164</sup> Suppose the answer is 3 out of 10,000 cases. Then the reader should ask how many of these three cases lead to kidney problems later on and how doctors deal with these problems and with what rates of success. It is worth mentioning that some *circumcised* males will develop UTIs before age four, and one can raise similar questions about treating them with antibiotics and other remedies.<sup>165</sup> There is a lot here to think through, but this passage in the Mayo Clinic Staff document does not seem to advance the case for nontherapeutic circumcision very much.

The reader is told that “[c]ircumcised men *might* have a lower risk of certain sexually transmitted infections, including HIV.”<sup>166</sup> The Mayo Clinic Staff does not say how much lower the risk is. Perhaps the word “might” indicates that it does not know how much lower the risk is, or does not have strong evidence demonstrating a lower risk rate.

In the last decade, some studies of African populations have claimed a positive role for circumcision in reducing HIV transmission.<sup>167</sup> It is not

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161. Christopher S. Cooper & Douglas W. Storm, *Infection and Inflammation of the Pediatric Urinary Tract*, in 4 CAMPBELL-WALSH UROLOGY, *supra* note 1, at 2926, 2942-44.

162. Commonly used oral antibiotics include amoxicillin-clavulanate and sulfamethaxazole-trimethoprim (TMP-SMX), which have diarrhea, rash, and nausea/vomiting as possible side effects. *Id.* at 2944 (Table 127-6). To be clear, I am not saying that physicians should just prescribe an antibiotic for a UTI, “for not all UTIs are the same.” *Id.* at 2926. They have to use their clinical judgment based on the patient’s presentation, laboratory work, and many other considerations, as Cooper and Storm explain. *Id.* at 2926-48.

163. Mayo, *supra* note 142 (emphasis added).

164. *Id.*

165. *Id.*

166. *Id.* (emphasis added).

167. *E.g.*, Emmanuel Njeuhmeli et al., *Voluntary Medical Male Circumcision: Modeling the Impact and Cost of Expanding Male Circumcision for HIV Prevention in Eastern and Southern Africa*, 8 PLoS MED. (no. 11, 2011). For other relevant sources, see *infra* note 190.



clear whether certain medical, sexual, and social practices in Africa are pertinent to or helpful for males in the United States or other developed countries.<sup>168</sup> Also, the findings of some African studies are not in step with the fact that the United States combines a relatively high percentage of STDs and HIV infections with a high percentage of neonatal circumcisions, whereas most European countries have low circumcision rates combined with relatively low HIV and STD rates.<sup>169</sup>

The Mayo Clinic Staff then reminds the reader, “[s]till, safe sexual practices remain essential.”<sup>170</sup> The reminder is well taken. Yet it gets the reader no closer to understanding whether circumcised men in the United States have a lower risk of certain STDs compared to uncircumcised men in the United States and, if so, how much lower the risk is.

The discussion of “penile problems” is largely unhelpful. It is true that “[o]ccasionally, the foreskin on an uncircumcised penis *can* be difficult to retract (phimosis).”<sup>171</sup> The Mayo Clinic Staff is vague on how frequently this difficulty occurs.<sup>172</sup> It does not mention that one can treat phimosis conservatively by using topical steroids and gently stretching the foreskin.<sup>173</sup> If conservative treatment fails, circumcision may be medically indicated, just as it would be if the foreskin or the glans becomes inflamed.<sup>174</sup> That is not pertinent to this Article, which addresses only circumcision without a medical indication.

Finally, the Mayo Clinic Staff discusses cancer risks. It says that “[a]lthough cancer of the penis is rare, it’s less common in circumcised men.”<sup>175</sup> In light of the rarity of penile cancer, one could reasonably ask whether it makes sense to circumcise a newborn on that ground, for even if he is circumcised he will still have some chance of developing penile cancer. A careful survey of research on this topic, by Natasha L. Larke and colleagues,<sup>176</sup> suggests that the matter is complicated. They discovered that some correlation holds for neonatal circumcision but not for circumcision after the neonatal period in regard to a lower risk

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168. See note 190 *infra*.

169. Frisch et al., *Cultural Bias*, *supra* note 150, at 798.

170. Mayo, *supra* note 142.

171. *Id.* (emphasis added).

172. *Id.*

173. See *id.*; Sukhbir Kaur Shahid, *Phimosis in Children*, 2012 ISRN UROLOGY 1, 2-3 (2012).

174. Mayo, *supra* note 142; Shahid, *supra* note 173, at 3-4.

175. Mayo, *supra* note 142.

176. See Natasha L. Larke et al., *Male Circumcision and Penile Cancer: A Systematic Review and Meta-Analysis*, 22 CANCER CAUSES CONTROL 1097, 1109 (2011).

of an already rare cancer.<sup>177</sup> They also discovered that some studies found the correlation not to hold even for neonatal circumcision once analyses were confined to boys with no history of phimosis.<sup>178</sup> Not only are penile cancers rare, most penile cancers are squamous cell carcinomas which, if detected early, are curable.<sup>179</sup>

In moving from penile to cervical cancer, the Mayo Clinic Staff says that “cervical cancer is less common in the female sexual partners of circumcised men.”<sup>180</sup> Even if this statement is true, the Mayo Clinic Staff offers no explanation of this correlation, and it does not say how much less common such cervical cancers are.

At least since 1954 U.S. physicians have discussed a possible connection between uncircumcised penises and cervical cancer.<sup>181</sup> Just after the turn of the millennium, Dr. Xavier Castellsagué and colleagues published an article that made stronger claims than the Mayo Clinic Staff.<sup>182</sup> They offered evidence and analysis that circumcision reduces the rate of penile HPV infection and claimed that it also reduces the risk of cervical cancer.<sup>183</sup> A pointed reply contended that the article “did not correct for several of the major known risk factors for cervical cancer,” employed a suspect method of obtaining HPV samples, and revealed HPV-DNA detection bias.<sup>184</sup> Subsequent papers seem to be either divided or inconclusive.<sup>185</sup>

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177. *Id.* at 1107.

178. *Id.* at 1109.

179. *Penile Cancer*, CANCER.NET (Apr. 2016), <http://www.cancer.net/cancer-types/penile-cancer/introduction> (“Ninety-five (95%) of penile cancer is epidermoid, or squamous cell, carcinoma,” and “can usually be cured” if “found at an early stage.”).

180. Mayo, *supra* note 142.

181. GLICK, MARKED IN YOUR FLESH, *supra* note 28, at 193-96, 315-16 (reporting on the inconclusive nature of some prominent articles on the issue prior to 2000).

182. Xavier Castellsagué et al., *Male Circumcision, Penile Human Papilloma Virus Infection, and Cervical Cancer in Female Partners*, 346 NEW ENG. J. MED. 1105, 1110-11 (2002).

183. *Id.*

184. John W. Travis, *Male Circumcision, Penile Human Papillomavirus Infection, and Cervical Cancer*, 437 NEW ENG. J. MED. 1448, 1452 (2012) (letter). A rebuttal by Castellsagué et al., *id.* at 1452-53 (letter), has not won over skeptics.

185. Compare, e.g., Genesa Albaro et al., *Male Circumcision and Genital Human Papillomavirus: A Systematic Review and Meta-Analysis*, 39 SEXUALLY TRANSMITTED DISEASES 104 (2012) (siding largely with Castellsagué, who is a coauthor), with, e.g., Robert Storms Van Howe, *Reply to “HPV and Circumcision: A Biased, Inaccurate and Misleading Meta-Analysis,”* 54 J. INFECTION 93 (2007) (letter) (a point-by-point effort to refute a critique by Castellsagué and others of a 2007 article by Van Howe). For a cautious and largely inconclusive study, see Yi-Ping Zhu et

Under these circumstances, it seems reasonable to turn to an organization that does not have a stake in the circumcision debates: the American Cancer Society (“ACS”). The ACS now lists the following risk factors for cervical cancer:

Human papilloma virus (HPV) infection, smoking, having a weakened immune system, chlamydia infection, a diet low in fruits and vegetables, being overweight, long-term use of oral contraceptives (birth control pills), intrauterine device (IUD) use, having multiple full-term pregnancies, being younger than 17 at your first full-term pregnancy, [low] economic status, diethylstilbestrol (DES), and having a family history of cervical cancer.<sup>186</sup>

The ACS does not mention a woman having regular sex with a man whose penis is uncircumcised as even a possible risk factor for cervical cancer.<sup>187</sup>

Individually, the asserted benefits discussed here seem anemic. Taken together, they still seem feeble. The cost-benefit discussion is not complete. Part III mentions a significant number of complications of circumcision, even though their incidence is unclear.<sup>188</sup> It remains to add, in Part X, a more complete and systematic discussion of the risks of circumcision and a range of subtle consequentialist considerations. It will prove advantageous to interweave these risks and considerations in the context of how the right not to be circumcised should be qualified.

#### X. QUALIFYING THE RIGHT NOT TO BE CIRCUMCISED: LIMITATIONS, EXCEPTIONS, BALANCING, AND FACT- SENSITIVITY

At this point I have laid out a basic case for an anticipatory moral right-in-trust of male minors not to undergo nontherapeutic circumcision. I have also preliminarily examined, and found weak, some

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al., *Relationship between Circumcision and Human Papillomavirus Infection: A Systematic Review and Meta-Analysis*, 19 ASIAN J. ANDROLOGY 125 (2017).

186. American Cancer Society, *What Are the Risk Factors for Cervical Cancer?* (last updated Nov. 1, 2017), <https://www.cancer.org/cancer/cervical-cancer/causes-risks-prevention/risk-factors.html> (bold type and most initial capital letters omitted).

187. *Id.* To prevent misunderstanding, I am not saying that no causal relationship exists between uncircumcised penises and cervical cancer, just that the available literature in English does not seem to have established that such a relationship exists, with or without HPV as a mediating factor, to the satisfaction of a substantial majority of reasonable researchers.

188. See *supra* text accompanying notes 11-16.

asserted benefits of neonatal circumcision. It is vital to recognize that the right not to be circumcised without medical indication is hardly absolute. To recognize this, it is necessary to show how the right ought to be qualified, particularly in light of the risks of the procedure. An important result of this part is that the moral impermissibility of circumcision is fact-sensitive.

*A. Limitations*

A limitation is a boundary condition on a right that depends on the reasons for the right.<sup>189</sup> The moral right in question here has an obvious explicit limitation: the right does not apply if there is a medical indication for circumcising a particular boy. A different limitation could be that the right does not apply if, say, circumcision of 97 percent of boys is necessary to provide herd immunity against the sexual transmission of HIV. Circumcision differs from childhood vaccinations because the latter involve no loss of nonrenewable functional tissue.

Despite this difference, it is possible that in a particular country, or for a particular population of males, the HIV sexual transmission rate might be so high and circumcision so prophylactically effective that the moral right not to be circumcised would not apply to every male minor. The empirical grounding for this possibility does not seem to exist in developed countries. However, it might exist in some developing countries.<sup>190</sup> Moreover, if highly effective antiviral therapies and treat-

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189. The difference between limitations and exceptions comes from Jeremy Bentham. See H. L. A. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799, 803-04 (1972) (explaining Bentham's distinction between limitations and exceptions).

190. See, e.g., Njeuhmeli et al., *supra* note 167 (suggesting that the relevant empirical grounding exists in some countries in eastern and southern Africa). For strong criticisms of prominent African clinical trials, see Lawrence W. Green et al., *Male Circumcision and HIV Prevention: Insufficient Evidence and Neglected External Validity*, 39 AM. J. PREVENTATIVE MED. 479 (2010). Kenneth Rochel de Camargo, Jr., et al., *Male Circumcision and HIV: A Controversy Study on Facts and Values*, 8 GLOBAL PUB. HEALTH 769, 776-79 (2013), are more cautious than Green et al., *supra* note 167, and other critics. Kirsten Bell, *HIV Prevention: Making Male Circumcision the "Right" Tool for the Job*, 10 GLOBAL PUB. HEALTH 552, 563 (2015), warns against assuming "a singular African sexuality characterised by promiscuity, gender violence and a lack of internalised moral restraints" (citations omitted).

The practice of "dry sex"—intercourse without vaginal lubrication—in some areas of Africa and in a few other countries may be another reason for high transmission levels of STDs and HIV. Some women in these areas and countries use drying agents in the belief that male sex partners will find a dry vagina pleasurable and assure them that a woman is chaste. See, e.g., Tinde van Andel et al., *Dry Sex in Suriname*, 116 J. ETHNOPHARMACOLOGY 84, 84 (2008) (stating that "dry sex damages the epithelium of the vagina and can lead to lacerations, inflammations, and the suppression of the vagina's natural bacteria, all of which increase the likelihood of sexually transmitted diseases"); Mags E. Beksinska et al.,

ments for AIDS became readily available at affordable prices, or if HIV mutated into a generally harmless virus, the limitation could cease to exist. The two limitations mentioned might not be exhaustive.

*B. Exceptions, Balancing, and Fact-Sensitivity*

An exception is a carve-out that exists if the reasons for the right are outweighed by other reasons. One possible exception to the right not to be circumcised is *reparability*. If it were possible to repair a circumcised penis so that it looks and functions like an intact penis, then one might have an exception to the right. Some body modifications are reparable. Mbuti people in the former Belgian Congo used to chip or file down a boy's front teeth so that they became sharp and pointed.<sup>191</sup> A dentist could repair this modification with dental crowns.<sup>192</sup>

Yet after circumcision, the foreskin and the frenulum never grow back.<sup>193</sup> One effort at repair would be to pull the thin skin that covers the shaft of the penis forward and keep it stretched—perhaps with tape, a clip, or weights. So long as the skin does not retract, it would look somewhat like a foreskin but would generally lack a frenulum or any mucosal tissue for lubrication. It would not function in sexual intercourse like a normal foreskin. Surgical repairs might do a bit better.

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*The Practice and Prevalence of Dry Sex among Men and Women in South Africa: A Risk Factor for Sexually Transmitted Infections?*, 75 SEXUALLY TRANSMITTED INFECTIONS 178, 178 (1999) (reporting that methods of drying and tightening the vagina include douches and the insertion of powders and cloths to reduce moisture in the vagina); Sunanda Ray et al., *Local Voices: What Some Harare Men Say about Preparation for Sex*, 4 REPRODUCTIVE HEALTH MATTERS 34 (no. 7, May 1996) (describing men's negative reactions to condoms, vaginal fluids, and "loose" vaginas and positive reactions to dryness and tightness, and women's search for dryness, youth, and freshness). A preference for dry sex may strike women and men in developed countries as unusual.

191. For a photograph of Ota Benga, a Mbuti man with sharp, pointed teeth brought to the United States, see PAMELA NEWKIRK, *SPECTACLE: THE ASTONISHING LIFE OF OTA BENG* 142 (2015) (opposing page); *Bushman Shares a Cage with Bronx Park Apes*, N.Y. TIMES, Sept. 9, 1906, at 17. On his maltreatment and short life, see, e.g., Sarah Zielinski, *The Tragic Tale of the Pygmy in the Zoo*, SMITHSONIAN MAG. (Dec. 2, 2008), <https://www.smithsonianmag.com/science-nature/the-tragic-tale-of-the-pygmy-in-the-zoo-2787905/>.
192. A core build-up may be needed "when more than 50% of the coronal part of the tooth is missing." Carol Tait & David Ricketts, *Cores*, in *ADVANCED OPERATIVE DENTISTRY: A PRACTICAL APPROACH* 87 (David Ricketts & David Bartlett eds., 2011).
193. S. S. Goonewardene & R. Percy, *Penile Grafting for Benign Causes: An Analysis of Patient Outcomes*, 3 J. ANDROLOGY & GYNECOLOGY 2, 2 (2015) ("It should be remembered that the foreskin never grows back and therefore with rare exceptions a redo circumcision should never be performed.").

Surgeries described in two leading urological journals are too complicated to explain here.<sup>194</sup> Both reconstructions yield a simulacrum of a foreskin, but without a frenulum or the capacity to self-lubricate, and both require convalescence.<sup>195</sup> At present, it appears that as a practical matter circumcision is not reparable.

A different possible exception to the right not to be circumcised is *triviality*. The amount of tissue removed, it could be said, is so small relative to a boy's body mass as to be trivial. If removing it is a moral wrong at all, it is the tiniest of moral wrongs. Consider two contrasting examples. In the first, I cheat at poker and win \$10 from you in a penny-ante game. In the second, I cheat at poker and win your used Rolex watch worth \$10,000 in a high-stakes game. The first wrong is not serious but the second is serious. The \$10 loss, it might be claimed, is as trivial as the loss of a foreskin.

I disagree. First, in all three cases a moral wrong exists. It is not morally permissible to do any of these things. Second, unlike the cheating at poker, the circumcision case carries medical risk to the boy. Anyone who reads the medical literature on circumcision knows that some circumcisions turn out badly, even very badly.<sup>196</sup> It is not trivial to impose this risk on male minors without a medical indication. This interim conclusion takes no position on which is morally worse—cheating someone out of a \$10,000 watch or exposing a boy to the risk of circumcision. A reason for not weighing these two wrongs is that risk analysis of circumcision, as will become apparent shortly, is fact-sensitive.

Still another possible exception to the right not to be circumcised is that *the net benefits of circumcision sufficiently outweigh the right*. This possible exception merits careful attention, and Part IX offered an analysis of the benefit side. But first I need to map out the respective domains of consequentialist considerations and anticipatory autonomy rights-in-trust. Let us begin with consequentialist considerations, distinguish between polar opposite decisions, and then ask where circumcision lies in relation to these poles.

At one pole are decisions that parents must make on behalf of their children because their children cannot make these decisions for themselves and because it is unreasonable to defer these decisions. For instance, a decision about the education a child is to receive cannot

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194. Willard E. Goodwin, *Uncircumcision: A Technique for Plastic Reconstruction of a Prepuce after Circumcision*, 144 J. UROLOGY 1203, 1203-04 (1990) (describing a two-stage reconstructive procedure); M. J. Lynch & John P. Pryor, *Uncircumcision: A One-Stage Procedure*, 72 BRIT. J. UROLOGY 257 (1993) (describing a one-stage reconstructive procedure).

195. Goodwin, *supra* note 194; Lynch & Pryor, *supra* note 194.

196. See *supra* text accompanying notes 9-13, and see *infra* text accompanying notes 197-198, 220-221.

reasonably be put off until the child is an adult. At the other pole are decisions that children cannot make for themselves but can reasonably be deferred without undue cost. For example, in most societies a decision about whom a child is to marry can reasonably be put off without undue cost until the child is competent to make that decision for himself or herself.

Circumcision lies somewhere in between these two poles, for there are costs either way. On the one hand, if the child is circumcised as a newborn or young boy, then there is the upfront expense of the procedure. More important are the costs calculable from known risks, including bad outcomes such as death, morbidity, disfigurement, and bad reactions to anesthesia.<sup>197</sup> If other boys in the child's social group are not circumcised, he may feel socially anomalous.

On the other hand, if the child is not circumcised as a newborn or boy, he may have a slightly greater risk of urinary tract infections in the first years of life, where the cost is calculable from bad outcomes such as experience of pain or discomfort, or the expense of having the infections treated with antibiotics.<sup>198</sup> Other costs may include the child feeling socially anomalous if he grows up in a social or religious group in which most other boys are circumcised.<sup>199</sup> Plus, if the boy upon attaining adulthood chooses to be circumcised, then he will experience more pain and discomfort and have a longer recovery period than if the procedure had been done in infancy or early childhood.<sup>200</sup>

The calculations could differ somewhat for male Jews and male Muslims. If they were not circumcised as infants or young boys, they could be more likely to seek a nontherapeutic circumcision as an adult than would men who are neither Jewish nor Muslim. If Jews and Muslims were in fact more likely to do so, they probably would experience more pain overall than if they had been circumcised as infants or young boys. Health care payment systems vary widely across

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197. Estimates of the risk of complications from nontherapeutic circumcisions vary widely among U.S. writers. Palmer & Palmer, *supra* note 4, at 3371, put the range at 0.2 to 5.0 percent, which is a wide range; GOLDMAN, *supra* note 61, at 33 (endnote omitted) (putting the range at 0.2 to 38 percent); the higher figure seems implausible to me. *See also* Charbel El Bcheraoui et al., *Rates of Adverse Events Associated with Male Circumcision in US Medical Settings, 2001 to 2010*, 168 JAMA PEDIATRIC 625, 625 (2014) (finding the incidence of "adverse events" from circumcision to be "slightly less than 0.5%") ( $n = 1,400,920$ ); it is not clear whether the term "adverse events" is equivalent to "complications."

198. For a start on calculations, *see* Krill et al., *supra* note 9, at 2462.

199. *See infra* Sections XI.B-C for detailed discussion of this social cost.

200. *See* Caryn L. Perera et al., *Safety and Efficacy of Nontherapeutic Circumcision: A Systematic Review*, 8 ANNALS FAM. MED. 64, 70 (2010) (pointing out that "[a]dult circumcision may potentially have more associated adverse events than childhood or neonatal circumcision, as adult circumcisions usually require surgical wound suturing").

the world, and some systems might reimburse for neonatal circumcisions for religious reasons but not for adult circumcisions for religious reasons. Still, health care coverage worldwide is variable in the present day, and it is uncertain what it might look like across the world twenty or forty years from now.

Part XI considers some issues pertaining mostly to Jews and Muslims. Nevertheless, provisionally and for the moment, the question might seem to be whether the costs outweigh the benefits of either circumcising while the child is not autonomous, or not circumcising until he is autonomous.

This question is indeed one relevant point to consider, but it is not the only or the most significant point. An imaginative consequentialist would suggest that one has to supplement the costs and benefits just described with at least three sets of costs and benefits. One supplementary set of costs and benefits to the child consists of the regret, or alternatively the gratitude, the circumcised child will experience once he becomes an adult. A second set of costs and benefits considers the uncircumcised child, whose feelings of regret, or gratitude, need to be taken into account. A third set consists of the costs and benefits of autonomy: either those of delaying the decision to circumcise until the child can make his own autonomous choice, or those of making the decision to circumcise now even though it might eliminate the possibility of the child making an autonomous decision as an adult.

Yet even the imaginative consequentialist does not account for the possibility a minor child might have a moral right, which is not reducible to consequentialist considerations, to make a decision on circumcision when he attains adulthood, and that prior to that time no one else has a right to make that decision for him.<sup>201</sup> Like some other thinkers,<sup>202</sup> I see no objection to a combined will (choice) and interest theory of rights. The right not to be circumcised would involve both a minor child's interests (including bodily integrity) and his will (as

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201. The non-reducibility clause in this sentence is open to the possibility of consequentialist rights but indicates that they are not the sort of rights I am interested in here. Hare's two-level utilitarian moral thinking and Sumner's indirect goal-based constraints on consequentialist goals are different ways of generating consequentialist rights. R. M. HARE, *MORAL THINKING: ITS LEVELS, METHOD AND POINT* 147-56 (1981) (allowing for utilitarian rights at the intuitive level but not at the critical level); L. W. SUMNER, *THE MORAL FOUNDATIONS OF RIGHTS* 163-98 (1987) (explaining how indirect goal-based constraints on consequentialist goals result in consequentialist rights).

202. *E.g.*, Rowan Cruft, *Rights: Beyond Interest and Will Theory*, 23 *LAW & PHIL.* 347, 387-90 (2004) (discussing a "combined" or "inclusive" theory). The "several functions theory of rights" advanced by Leif Wenar, *The Nature of Rights*, 33 *PHIL. & PUB. AFF.* 223, 246-51 (2005), in some respects combines will and interest theories. It "also recognizes rights beyond those recognized by either the will theory or the interest theory." *Id.* at 248.



anticipatory autonomy). This moral right would be both a moral claim not to be circumcised and a moral claim-against parents who seek to have the child circumcised. In the absence of a medical indication, the claim-against circumcising might also create a moral duty on guardians, trustees, physicians, and ritual circumcisers.<sup>203</sup> The weight of this right would depend in part on the risks to the child. The right would have significant weight, even if the medical risk to the child is minor, because one should protect the child's eventual autonomous choice about whether to be circumcised. The right against circumcision would have even greater weight if the circumciser is poorly trained and lacks sterilized instruments.

The moral impermissibility, or permissibility, of circumcision is fact-sensitive. Moral rights are not usually trumps against powerful consequentialist considerations, but it hardly follows that the slightest balance of consequentialist considerations trumps moral rights. After all, bodily integrity and autonomy are important values and important moral norms, as argued in Part IV. It is these norms and values that undergird a moral right not to be circumcised without medical indication.

In this brief treatment of exceptions I mentioned that the right not to be circumcised must be *sufficiently* outweighed by the net benefits of circumcision in order for the right not to be applicable in particular circumstances. To make more concrete how relevant net medical benefits and costs affect determinations of whether the right is, or is not, sufficiently outweighed, I list some common-sense factors.

Common sense suggests that the following factors make the circumcision of male minors less safe because of increasing risk of infections, botched procedures, morbidity, and mortality. These factors include: unhealthy child; dirty or unsterilized instruments; unsterile field (i.e. failure to use an antiseptic on the genitals and surrounding area); lack of a sterile drape; unskilled, inexperienced, or impaired circumciser; use of an instrument or device, e.g. a Mogen clamp, that the circumciser lacks the skill to use; failure to anticipate potential complications; poor wound care; inadequate aftercare instructions; lack of proper training and skill to perform circumcisions on older boys or adolescents; circumcisers who have communicable diseases; and poor management of anesthesia. If all of these factors were present, circumcision would be unsafe. This list does not state all factors that decrease safety.

Predictably, common sense also suggests that the following factors make the circumcision of minors safer because they hold down the risk of infections, botched procedures, morbidity, and mortality. The factors include: a healthy child; sterilized instruments, preferably autoclaved;

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203. See Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970); James W. Nickel, MAKING SENSE OF HUMAN RIGHTS 28-34 (2d ed. 2007).

sterile field; sterile drape; skilled, experienced, and unimpaired circumciser; use only of instruments and devices that the circumciser has been trained to use and has a high level of skill with them; a circumciser who is prepared not only to do the procedure but also to handle any complications; excellent wound care; clear instructions for those who will be caring for the infant or boy after circumcision; the training and skill of a urologist for circumcisions performed on older boys or adolescents; circumcisers free of communicable diseases; and appropriate use of anesthesia.<sup>204</sup> If all of these factors were present, circumcision would be safer. This list does not state all factors that promote safety.

In spite of these areas of general agreement, physicians from different medical cultures view circumcision differently. The American College of Obstetricians and Gynecologists (“ACOG”) and the American Academy of Pediatrics (“AAP”) stopped short of saying that neonatal circumcision should be routine, but they did support the procedure overall. In 2011, the ACOG reaffirmed its earlier position in 2001 that there are “potential medical benefits” of circumcision even though they are “modest.”<sup>205</sup> In 2012 the AAP, much like the Mayo Clinic Staff, said that “current evidence indicates that the health benefits of newborn male circumcision outweigh the risks and that the procedure’s benefits justify access to this procedure for families who choose it.”<sup>206</sup> The proposed guidelines on circumcision by the Centers for

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204. Some circumcisions are done without anesthesia. One reason for not using anesthesia is a religious belief that circumcision should be painful. *See, e.g.*, 2 MAIMONIDES, GUIDE, *supra* note 28, at 609 (“The bodily pain caused to that member [the penis] is the real purpose of the circumcision.”). *See also Jewish Circumcision*, *supra* note 1, at 732 (stating that even though Maimonides saw a purposive role for pain in circumcision, “this type of logic was not adopted by the majority of [Jewish] legal scholars.”).

205. ACOG Committee on Obstetric Practice, *Circumcision*, 98 OBSTETRICS & GYNECOLOGY 707, 707 (2001) (Comm. Opinion 260).

206. American Academy of Pediatrics, Task Force on Circumcision, *Circumcision Policy Statement*, 130 PEDIATRICS 585-86 (2013) [hereinafter AAP Task Force]. *See also* AAP TASK FORCE, MALE CIRCUMCISION (Sept. 2012), available at <http://www.pediatrics.org/cgi/content/full/130/3/e756> [hereinafter AAP Technical Report] (buttressing the policy statement). *See also* BRIAN MORRIS, IN FAVOUR OF CIRCUMCISION (1999) (advocating for neonatal circumcision); Brian J. Morris et al., *Circumcision Rates in the United States: Rising or Falling? What Effect Might the New Affirmative Pediatric Policy Statement Have?*, 89 MAYO CLINIC PROC. 677, 677 (2014) (“A risk-benefit analysis of conditions that neonatal circumcision prevents against revealed that benefits exceed risks by at least 100 to 1 and that over their lifetime, half of uncircumcised males will require treatment for a medical condition associated with the retention of the foreskin.”).

Disease Control and Prevention (“CDC”) took a similar position, but Brian Earp’s critique of its position seems thorough and reasonable.<sup>207</sup>

Pediatricians from Canada and sixteen European countries published a counter-piece to the AAP’s policy position and technical report, in which they concluded that circumcision’s health risks outweigh its benefits.<sup>208</sup> They contended that nontherapeutic circumcision violates the basic principle of medicine: *primum non nocere* (“First, do no harm”).<sup>209</sup> They argued that only one of the reasons given by the AAP—namely, a lower incidence of urinary tract infections in infant boys—has “some theoretical relevance.”<sup>210</sup> Such infections, however, “can easily be treated with antibiotics without tissue loss.”<sup>211</sup>

In addition, German and Dutch medical associations take a rather different view from that of the AAP, the ACOG, the CDC, and the Mayo Clinic Staff. For instance, consider the position of the German Academy of Children and Youth Medicine (Deutsche Akademie für Kinder- und Jugend Medizin) (“DAKJ”), which is the umbrella association of the three main pediatric organizations in Germany.<sup>212</sup> Despite the 2012 German statute allowing nontherapeutic circumcisions in some circumstances, the DAKJ Opinion of 2016 did not consider the procedure to be scientifically justified and put its complication rate at around 6 percent.<sup>213</sup> The Royal Dutch Medical Association found “no convincing evidence that circumcision is useful or necessary in terms of

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207. Brian D. Earp, *Do the Benefits of Male Circumcision Outweigh the Risks? A Critique of the Proposed CDC Guidelines*, 3 FRONTIERS PEDIATRICS (Article 18, Mar. 2015).

208. Frisch et al., *Cultural Bias*, *supra* note 150.

209. *Id.* at 799.

210. *Id.* at 796. See also J. Stephen Svoboda & Robert S. Van Howe, *Out of Step: Fatal Flaws in the Latest AAP Policy Report on Neonatal Circumcision*, 39 J. MED. ETHICS 434, 437 (2013) (offering a serious if at times overheated and impolite critique of the AAP); AAP Task Force, *The AAP Task Force on Neonatal Circumcision: A Call for Respectful Dialogue*, 39 J. MED. ETHICS 442, 442 (2013) (urging politeness but addressing few of their criticisms).

211. Frisch et al., *Cultural Bias*, *supra* note 150, at 796.

212. DAKJ, *Profil und Aufgaben der DAKJ* [Profile and Mission of the DAKJ], DEUTSCHE AKADEMIE DER KINDER- UND JUGENDMEDIZIN, available at <https://dakj.de/profil-und-aufgaben> (last visited Oct. 17, 2017).

213. DAKJ, Kommission für ethische Fragen der DAKJ [Commission for Ethical Questions Asked of the DAKJ], *Stellungnahme zur Beschneidung von minderjährigen Jungen* [Opinion on Circumcision of Male Minors], available at <https://dakj.de/wp-content/uploads/2016/12/2016-dakj-beschneidung-jungen.pdf> (last visited Oct. 17, 2017).

prevention or hygiene,” and brings with it “the risk of medical and psychological complications.”<sup>214</sup>

What is going on here? The United States has a tradition of neonatal nontherapeutic circumcision going back to the late nineteenth century.<sup>215</sup> The United Kingdom and other European countries do not have a tradition of this sort—except for Jews and, more recently, Muslims.<sup>216</sup> The AAP considers there to be at least a slight balance in favor of circumcision because it believes that the perceived benefits outweigh the risks.<sup>217</sup> German and other European medical opinion believe the risks outweigh the benefits.<sup>218</sup>

U.S. medical opinion seems to base its comparatively low estimate of risk in part on the fact that medical doctors perform the vast majority of U.S. circumcisions.<sup>219</sup> German and other European medical opinion could point to somewhat higher complication rates because historically many ritual nontherapeutic circumcisions were not done by physicians.<sup>220</sup> From a European point of view, the risks of circumcision

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214. *Non-Therapeutic Circumcision of Male Minors*, ROYAL DUTCH MEDICAL ASSOCIATION at 14 (May 27, 2010).

215. Laura M. Carpenter, *On Remedicalisation: Male Circumcision in the United States and Great Britain*, 32 SOC. OF HEALTH & ILLNESS 613, 620 (2010) (describing the “partial demedicalisation” in the U.S. from the 1880s to early in the twenty-first century, where the rate rose in the early years to a peak in the early 1970s and declined thereafter).

216. In the U.K., the story was one of “demedicalisation”: a rise in circumcision rates in the late nineteenth century to a peak in the early 1930s, which dropped thereafter. *Id.* at 618-20. “Rates of circumcision fell rapidly, from 33-40 per cent of British boys in the 1930s, to 20 per cent by 1949, 10 per cent by 1963, and six per cent by 1975.” *Id.* at 619. As of 2010, the National Health Service covered “circumcision only for medical reasons, in about one per cent of males; another five per cent of boys are circumcised for religious reasons.” *Id.* at 620.

217. *See supra* text accompanying note 242.

218. *See* Stephen R. Munzer, *Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy*, 37 U. PA. J. INT’L L. 503, 563-64 (2015) [hereinafter Munzer, *German Circumcision Controversy*].

219. *See* AAP Technical Report, *supra* note 206, at e756, e772-e773 (“In general, untrained providers who perform circumcisions have more complications than well-trained providers who perform the procedure, regardless of whether the former are physicians, nurses, or traditional religious providers.”).

220. GLICK, MARKED IN YOUR FLESH, *supra* note 28, at 125-29, 132-34, indicates that starting in the late eighteenth century and solidifying in the nineteenth, some Jewish physicians in central Europe criticized what they saw as the incompetence of mohalim: poor sanitary practices, accidental severing of penile arteries, mutilated penises, frequent infections, and above all the practice of *metzitzah b’peh*. It seems possible that some non-Jewish physicians could have become aware of these criticisms.

are perhaps heightened by perceptions that ritual circumcisers perform many circumcisions and that, except perhaps for Jewish mohalim, they are not very good at it.<sup>221</sup> It is difficult to know how much anti-Semitism and anti-Muslim sentiment shape these rather different perspectives on circumcision in the United States and Europe.

It would be splendid if it were possible to know whether medical associations in the United States or those in Europe are closer to the truth regarding the risks of the procedure. Still, current data and biased readings of the available data hinder or even render impossible any sound comparison at present. Among developed countries, it is not clear that relevant medical associations could even agree on a uniform research protocol to be applied in order to determine risks and benefits. Also, it is not evident that these associations could agree on standard research protocols to answer questions on complication rates for neonatal, youth, and adult circumcisions; differences in sexual pleasure, if any, between circumcised and uncircumcised men; and discerning the sexual impact, if any, on long-term female partners of circumcised versus uncircumcised men.<sup>222</sup>

For sake of argument, suppose that the AAP, the CDC, and the Mayo Clinic Staff are correct that, overall, there is a very slight benefit in favor of neonatal nontherapeutic circumcision. It is evident, however, that for any particular newborn male, a risk exists that *he* will have one or more complications from circumcision and that, in *his* case, the harms will exceed the benefits of the procedure. Moreover, it is either his parents or the circumciser, or both, who *impose* this risk on him. One should then ask whether the boy has a right against the parents or the circumciser, or both, that they not impose this risk on him. In no way do I favor the promiscuous minting of rights against risk, because all people constantly impose risks on one another. There is, however, some merit in John Oberdiek's suggestion that "it is the risk

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221. "In May [2013] there were at least thirty dead boys just in the South African Province of Mpumalanga . . . . They died in the wake of their circumcision because of bleeding out or infection." Tonio Walter, *Das Unantastbare Geschlecht* [The Sacrosanct Sex], DIE ZEIT, July 4, 2013, available at <http://www.zeit.de/2013/28/genitalverstuemmelung-gesetzfrauen> (my translation) (last visited Dec. 5, 2017). A ritual circumciser with little medical training performed these circumcisions. *Id.* Cf. S. A. H. Rizvi et al., *Religious Circumcision: A Muslim View*, 83 BJU INT'L 13, 14-15 (Table 1) (Suppl. 1, 1991) (reporting that "[i]n Pakistan, 90-95% of circumcisions are performed by traditional circumcisers, village barbers, paramedical theatre staff and technicians," with hemorrhage and infection being the most frequent complications).

222. Studies exist on almost all of these issues, but the absence of agreed research protocols makes it nearly impossible to compare different countries by using the same metrics.

imposer who wields power over the one who is put at risk.”<sup>223</sup> He suggests, more fully, “that autonomy-diminishing risk impositions are justified so long as the ends that produce the risks could be endorsed by those who are subject to them.”<sup>224</sup>

But a newborn baby is not currently autonomous. He has no capacity to assess whether the risk is justified to him. If he is circumcised as an infant, his autonomy over his body diminishes because he will no longer be able, as an adult, to decide whether to consent, or withhold consent, to being circumcised. It now becomes harder to see why his parents or the circumciser, or both, are acting in a morally permissible way with respect to him as an infant. This situation differs from situations in which there is herd immunity, as in the case of vaccinations. It also differs from circumcisions for which a medical indication exists.

Thus far, Part X has dealt with the medical costs and benefits of nontherapeutic circumcision. It is useful to shift now to a particular social cost of *not* circumcising male minors without medical indication: the adverse impact on the preferences of some heterosexual U.S. women who are neither Jewish nor Muslim and who dislike uncircumcised penises in intimate situations. Intact penises are fodder for female comedians.<sup>225</sup> Some U.S. women dislike even the thought of fellating men who are uncircumcised.<sup>226</sup> If there exists a rigorous empirical study of the percentage of non-Jewish, non-Muslim heterosexual U.S. women who have negative attitudes to uncircumcised penises, it has eluded my efforts to find it. The interested reader can get some idea of the diversity of opinions and preferences by googling “American women uncircumcised penises” or similar phrases. Additionally, there is a possible second social cost: the disappointment felt by an uncircumcised man who is rejected by a heterosexual woman on the ground that she intensely dislikes the way his penis looks.

Insofar as there is an argument here, it could go like this: If parents were persuaded by the arguments of this Article or by similar considerations, that would increase the U.S. supply of uncircumcised

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223. John Oberdiek, *Towards a Right Against Risking*, 28 LAW & PHIL. 367, 389 (2009) (citation omitted). Oberdiek does not discuss circumcision.

224. *Id.* at 391.

225. See, e.g., Amy Schumer, *Mostly Sex Stuff*, (Comedy Central, 2012) (making fun of uncircumcised penises).

226. Shawnee Barton, when pregnant with a male child, sought the views of doctors and friends on circumcision. One voice in favor of circumcision said: “An OBGYN mother-in-law asked my friend, who was carrying her grandson-to-be at the time, ‘Don’t you want him to get blow jobs some day?’” See Shawnee Barton, *The Circumcision Wars: What’s a Parent to Do?*, THE ATLANTIC (July 29, 2013) <http://www.theatlantic.com/health/archive/2013/07/the-circumcision-wars-whats-a-parent-to-do/278155/>.

men. This increase could have a negative impact on an unknown number of American women and cause disappointment in an unknown number of rejected uncircumcised American men.

This argument seems weak. First, the percentage of American males who are circumcised has been declining for decades.<sup>227</sup> A 2013 report by the National Center for Health Statistics indicated a drop in neonatal nontherapeutic circumcisions from 64.5 percent in 1979 to 58.3 percent in 2010.<sup>228</sup> A follow-up article in the *New York Times* ascribed the drop in circumcision rates to a decline in the strength of the claims for the benefits of the procedure made by U.S. medical groups, particularly the AAP.<sup>229</sup> Second, the likelihood that this Article will cause nontherapeutic circumcisions to plummet in the U.S. is zero. Third, there are many fish in the sea. Heterosexual women who would never have sex with an uncircumcised man will find an abundance of circumcised men available. Heterosexual men who have been rejected by a few heterosexual women because of their circumcised penises will find that they are not headed for a life without sex or marriage.

If Jewish or Muslim parents were to act on the arguments advanced here, the situation could be quite different, as Part XI will make clear.

#### XI. EVALUATION OF SOME ARGUMENTS FAVORING CIRCUMCISION BY SOME GROUPS

Freedom of religion is an important value. Judaism and Islam have existed for a very long time, and circumcision has profound social meaning in most Jewish and Muslim communities.<sup>230</sup> It is important to explore how much weight, if any, should be given to considerations of toleration, longevity, and social meaning. One or more of these considerations might ground exceptions to the right not to be circumcised without medical indication.

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227. Maria Owing et al., *Trends in Circumcision for Male Newborns in U.S. Hospitals: 1979-2010*, DIVISION OF HEALTH CARE STATISTICS, CENTERS FOR DISEASE CONTROL & PREVENTION (Aug. 2013).

228. *Id.* A different 2013 study based on a representative sample reported the following circumcision rates in 2005-2010 for certain races and ethnicities: non-Hispanic whites—90.8 percent, non-Hispanic blacks—75.7 percent, and Mexican Americans—44 percent. Camille E. Introcaso et al., *Prevalence of Circumcision among Men and Boys Aged 14 to 59 Years in the United States, National Health and Nutrition Examination Surveys 2005-2010*, 40 SEXUALLY TRANSMITTED DISEASES 521, 521-22 (2013).

229. Nicholas Bakalar, *U.S. Circumcision Rates are Declining*, N.Y. TIMES (Aug. 22, 2013), <https://well.blogs.nytimes.com/2013/08/22/u-s-circumcision-rates-are-declining/>.

230. See *infra* Section XI.C.

*A. Freedom of Religion: Toleration and Multiculturalism*

Many contend that freedom of religion and toleration are both important values. I agree. I also agree that most religious practices should be tolerated. But I have reservations about religious rituals that are practiced on the bodies of minors who are unable to either autonomously consent or successfully resist. My reservations extend in particular to religious practices that remove nonrenewable functional tissue, target the genitals, and modify minors' bodies with a permanent symbol of the religious affiliation of their parents or their parents' religious community.

To be clear, this Article does not contend that the law should forbid or restrict religious practices of circumcision. Nor does it contend that social sanctions—such as ostracism, name-calling, public shaming, or picketing in front of mosques or synagogues—are defensible responses to religious circumcisions. I reject both of these contentions. I do contend that male minors have a right not to be circumcised without a medical indication.

Furthermore, in open societies, legal and social sanctions are often ineffective in getting people to change deep-seated religious behavior. Witness the furor that erupted when, in 2012, a Cologne appellate court ruled that nontherapeutic circumcision of a Muslim male minor was a criminal assault; the controversy continued even after the German Parliament passed a law allowing religious and secular circumcisions with some restrictions.<sup>231</sup>

Jewish and Islamic traditions have the theological and intellectual resources to alter their practices in certain ways. In Judaism, circumcision *milah* and *peri'ah* replaced circumcision *milah*, in which a lesser amount of foreskin tissue was removed.<sup>232</sup> Because the circumstances surrounding the Bar Kokhba revolt in the second century C.E. and rabbinic concerns that Jewish men were trying to “obliterate the Seal of the Covenant” by epispasm<sup>233</sup> have faded,<sup>233</sup> one might wonder whether a return to circumcision *milah* is possible. *Metzitzah b'peh* fell by the wayside save in Hasidic communities.<sup>234</sup> A long-standing method of removing the mucous membrane covering the glans, in which the

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231. Munzer, *German Circumcision Controversy*, *supra* note 218, at 503.

232. *Jewish Circumcision*, *supra* note 1, at 730-31. The purpose of the change was to prevent Greco-Roman Jews, in baths and athletic contests, from hiding their mark of Jewishness through epispasm by moving forward what remained of their foreskin and tying it off with a circular pin. 1 *Maccabees* 1:14-15. For the view that negative attitudes toward Jewish circumcision among Greco-Romans and the earliest Christians “largely account[] for a heightened importance attached to circumcision among Jews,” see David A. Bernat, *Circumcision*, in *THE ENCYCLOPEDIA OF ANCIENT HISTORY* 1509, 1509-10 (Roger S. Bagnall et al. eds., 2013).

233. *Jewish Circumcision*, *supra* note 1, at 731.

234. *Id.* at 734.



mohel separated the membrane with a sharpened thumbnail and tore away the membrane and other parts of the foreskin with his fingers, was retired by the mid to late nineteenth century as a cause of serious infections.<sup>235</sup> We have already seen that the circumcision-substitute known as *hatafat dam brit* is used for infants who congenitally lack a foreskin, and many rabbis require it of circumcised gentiles who want to convert to Judaism.<sup>236</sup> I do not claim that change comes quickly or that Jewish views on circumcision are infinitely malleable.

The *Encyclopaedia Judaica* also says that:

[t]here is a law that a mother who has lost two children from the unquestionable effects of circumcision must not have her next sons operated on until they are older and better able to undergo the operation. Moreover, should two sisters each have lost a son from the effects of circumcision, the other sisters must not have their sons circumcised (Sh. Ar., YD 263:2-3).<sup>237</sup>

Despite appearances, this passage may not exhibit flexibility on circumcision per se. Rather, it grows out of a different principle called *piku'ach nefesh docheh Shabbat*, which says that saving a life supersedes commandments such as keeping the Sabbath.<sup>238</sup> This principle prescribes that saving a life supersedes all commandments and prohibitions except for three: do not murder, do not commit adultery, and do not bow to foreign idols.<sup>239</sup> Because circumcision is not one of the three exceptions, if there is evidence that a newborn boy might be at risk because of the procedure, it should be delayed or not done at all.<sup>240</sup>

In Islam, too, one finds some flexibility on the practice of circumcision. There are different schools of Islamic law. Only in Shiite and Sunni (in the latter, only the Shafi'i and Hanbali sub-schools) legal schools is circumcision a matter of obligation (*wajib*).<sup>241</sup> Two other sub-

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235. *Id.*; GLICK, MARKED IN YOUR FLESH, *supra* note 28, at 45, 127, 131, 137.

236. *Jewish Circumcision*, *supra* note 1, at 732.

237. *Id.* at 734.

238. The biblical source of this principle is *Leviticus* 18:5: "You shall keep My laws and My rules, by the pursuit of which man shall live: I am the LORD" (Tanakh translation) (initial capital letters and small capital letters in original). The Babylonian Talmud understood this text to mean that you shall live by these laws and rules, not die as a consequence of observing them. *Yoma* 85b. Later rabbinic commentary elaborated on this principle. The Jewish tradition evidences vigorous interpretive debate, so it might be unclear how much at risk a newborn boy must be for the principle to apply.

239. See *Pikku'ah Nefesh*, in 16 *ENCYCLOPAEDIA JUDAICA* 152-53 (2d ed. 2007).

240. I thank Sharona Hoffman for bringing the existence and scope of this principle to my attention.

241. Munzer, *German Circumcision Controversy*, *supra* note 218, at 526 n.106.

schools (the Hanafi and the Maliki) of Sunni law regard circumcision as recommended (*sunna*), or even very highly recommended, and in practice perform circumcision quite often.<sup>242</sup>

Some Islamic scholars seem to limit the amount of foreskin tissue removed. Circumcision, it is said, “is a legal necessity, to be performed within the limits of the necessity.”<sup>243</sup> “[T]his rule means only removing the part of the skin that covers the glans.”<sup>244</sup> Islamic circumcision, so understood, seems akin to Jewish circumcision *milah* rather than *milah* and *peri’ah*.<sup>245</sup> If so, the Islamic position for boys has something in

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242. For a panoramic treatment of aḥādīth, Islamic law, and the future of the Islamic legal order, see HANS KÜNG, ISLAM: PAST, PRESENT AND FUTURE 263-78, 317-23, 437-44, 551-77 (John Bowden trans., [2004], 2007) [hereinafter KÜNG, ISLAM].

243. Alahmad & Dekkers, *supra* note 20, at 5.

244. *Id.*

245. This possible parallel does not assume that Islam either borrowed from, or was influenced by, Jewish legal positions on circumcision. That would be a matter for historical evidence and argument. See SALAYMEH, ISLAMIC LAW, *supra* note 60, at 88-90, 105-35 (2016) (discussing commonalities and differences between Abrahamic and Islamic circumcision practices in the late antique (610-800 C.E.) and medieval (800-1400 C.E.) periods). Egyptians circumcised well before the ancient Israelites came into existence. Throughout the ancient Middle East some groups circumcised and some did not, and circumcision perhaps did not become a distinctive Israelite/Jewish practice until the Hellenistic era. See GOLLAHER, CIRCUMCISION, *supra* note 5, at 1-9. On the transition from Israelites to Jews, see generally SHAYE J. D. COHEN, THE BEGINNINGS OF JEWISHNESS: BOUNDARIES, VARIETIES, UNCERTAINTIES 1-197 (1999).

Many non-monotheistic Arabs probably circumcised in the pre-Islamic Arabian Peninsula, without having borrowed the practice from Jews. See JAN RETSÖ, THE ARABS IN ANTIQUITY: THEIR HISTORY FROM THE ASSYRIANS TO THE Umayyads 607 (2003); SALAYMEH, ISLAMIC LAW, *supra* note 60, at 109; Kathryn Kueny, *Abraham’s Test: Islamic Male Circumcision as Anti/Ante-Covenantal Practice*, in BIBLE AND QUR’AN: ESSAYS IN SCRIPTURAL INTERTEXTUALITY 161 (John C. Reeves ed., 2003).

At least three additional features of Islamic circumcision merit attention. First, changes occurred in the understanding of circumcision: as a practice of cleanliness or grooming, a practice of ritual purity, and a covenantal practice—but all of these in a nonlinear fashion. SALAYMEH, ISLAMIC LAW, *supra* note 60, at 122 *passim*. Second, once Muslims understood circumcision as partly a covenantal practice, “female circumcision” could be thought of as bringing girls and women into the covenant. *Id.* at 133-34. Third, Islamic scholars differ on the age at which (male) circumcision should be performed—from a day or two after birth to puberty. *Id.* at 128-30. The latest age for Islamic circumcision I have seen is 16, among the “Surinamese Javanese”; see DESSING, RITUALS, *supra* note 60, at 53 (the author may mean “Javanese Surinamese”). Even at age 16, the boy is “mostly shamed into it.” *Id.* at 54 (quoting ANNEMARIE DE WAAL MALEFIT, THE JAVANESE OF SURINAM: SEGMENT OF A PLURAL SOCIETY 145 (1963). *Genesis* 17:25 says that Ishmael, who later became an important figure in Islam, was circumcised at age 13. For a judicious appraisal of

common with an Islamic position for girls in Indonesia in which female “circumcision” is “an act of scratching the skin that covers . . . the clitoris . . . without injuring the clitoris.”<sup>246</sup>

In any event, this Article develops arguments that cast doubt on the moral permissibility of circumcision, unless some justified, fact-sensitive limitation or exception applies to the anticipatory moral right-in-trust of male minors not to be circumcised without medical indication. I am aware that some religious persons might object that it is intolerant for me to express an opinion that differs from their own opinions on circumcision. I respectfully disagree with the objection. A good way to show tolerance is to listen carefully to what all sides have to say and think deeply about what they say.

The contribution of multiculturalism and toleration is mixed. Let us understand *multiculturalism* as a governmental and social policy that asks all persons to respect and value cultural and religious practices that differ from one’s own. And let us understand *toleration* as declining to interfere with, and sometimes even to refrain from intentional small aggressions against, what one sees as the objectionable behavior or practices of other persons or groups.

On the positive side, multiculturalism and toleration might increase one’s sense of others who have different histories, different cultural and religious practices, and different conceptions of the good from one’s own. This upside increases if others in turn respect and value one’s own history, practices, and conception of the good. By this route all of us can gain a better understanding of the world and the human beings with whom we share this planet. If some practices seem so intolerable that we cannot accept them,<sup>247</sup> we should in charity hope that in time these practices might fade away.

On the negative side, multiculturalism seems to lack the normative tools to defend morally appropriate limits on toleration. To illustrate, Wendy Brown writes intelligently of the aversion some individuals have to the behavior of others.<sup>248</sup> She correctly recognizes many “political discourses.”<sup>249</sup> One is a discourse of power, in which the powerful see

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Salaymeh’s book, see Mohammed Fadel, *Book Review*, 85 J. AM. ACAD. RELIGION 844, 844-47 (2017) (reviewing SALAYMEH, ISLAMIC LAW, *supra* note 60).

246. Belluck & Cochrane, *supra* note 139. See also *supra* text accompanying note 139.

247. On intolerability, see D. D. Raphael, *The Intolerable*, in JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES 137 (Susan Mendes ed., 1988).

248. WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY (2006). She usually uses the word “tolerance” rather than “toleration.” *Id.* at 13-24. She mentions circumcision only in passing; *e.g.*, *id.* at 146.

249. *Id.* at 25 and *passim*.

others' practices as "revolting," "repugnant," or "vile."<sup>250</sup> Another is a discourse of toleration, in which the tolerators are "civilized," and the tolerated are "barbarians."<sup>251</sup> But multiculturalism, which Brown mentions frequently,<sup>252</sup> sometimes must be purchased at a price that one group sees as intolerable. In addition to political discourses, Brown needs moral and philosophical discourses.

Morally speaking, Brown leaves matters at an impasse. She seems to lack, or at least not to use, the vocabulary to participate in a fully rational conversation about the moral merits and moral shortcomings of nontherapeutic circumcision. Perhaps she thinks that it is impossible for all parties to have such a discussion. However, I maintain that she is not trying hard enough. This Article is an effort to advance the conversation farther than multiculturalism allows.

Specifically, even if a particular religious group insists on retaining its practice of nontherapeutic circumcision, but does not try to force this practice on other groups in society, there is some warrant to tolerate the practice, even if one considers the practice to be morally wrong. Jews and Muslims are not requiring, at least in the modern age,<sup>253</sup> that non-Jews and non-Muslims be circumcised. All the same, a just pluralist society sometimes acts rightly in preserving itself even if it would otherwise apply a principle of tolerance. As Rawls puts it:

[w]hile an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger.<sup>254</sup>

### *B. Longevity*

How much, if at all, does the longevity of a practice of religious circumcision matter for moral assessment? To answer this question, I first examine a hypothetical case in which a new religion has practiced circumcision for forty years. I argue that a mere four decades does not carry much weight in assessing the moral permissibility of the practice.

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250. *Id.* at 25.

251. *Id.* at 149 and *passim*.

252. *See id.* at 19, 93, 150, 152, 168, 189, 190-91, 194, 200-01 (suggesting that to be tolerant of other cultures, people might have to accept practices that they see as quite objectionable).

253. *Genesis* 17:27 says that Abraham's "homeborn slaves and those that had been bought from outsiders" were circumcised on the same day as Abraham and Ishmael (Tanakh translation). *See also* GLICK, MARKED IN YOUR FLESH, *supra* note 28, at 42-43, 291 (reporting that even into the fourth and fifth centuries C.E. Jews sometimes circumcised their non-Jewish slaves, for which the Romans severely punished the Jewish offenders).

254. JOHN RAWLS, A THEORY OF JUSTICE 220 (1971).

I then turn to the world as we know it, in which Judaism and Islam have circumcision practices of great longevity. This situation is morally more complicated, because to cease either of these practices would disappoint the expectations of many current-day Jews and Muslims. There would be substantial psychological, social, and religious costs of ending these practices. These costs would, of course, have to enter into any consequentialist analysis of the moral permissibility of circumcision. However, the main arguments of this Article are deontological rather than consequentialist. The costs just described are of modest weight in the face of deontological arguments supporting a moral anticipatory autonomy right-in-trust of male minors not to be circumcised.

Consider an extended hypothetical case in which religiously-based circumcision is historically much younger.<sup>255</sup> Imagine that Judaism, Christianity, and Islam never existed. Until 40 years ago, there was no religion that considered circumcision a duty, or even a mildly recommended practice for male newborns or other male minors. Neither did any secular practice exist of circumcising male minors without medical indication. Worldwide, a few cultural groups in the Amazon rainforest and on small islands off Malaysia circumcised young boys. These groups had a total population of 7,500. Exactly why these groups circumcised young boys was unknown.

Forty years ago, a group of people split off from a large monotheistic religion in the Middle East. Let us call this breakaway group the Splitters. The larger religion, numbering some one hundred million people, had never circumcised. But the split-off group responded to calls in their sacred writings—which were of recent vintage and not recognized as canonical texts by the larger religion—for the circumcision of males within the first three months of life. The Splitters now number one million people. They tend to keep their practices secret and rarely allow outsiders to witness their religious ceremonies. Indeed, it became generally known only about twenty years ago that they had a practice of circumcision. Investigation by outsiders, aided by some lapsed Splitters, revealed that circumcision is intensely important to their relationship with God and their social and religious identity. The social meaning of circumcision to them is deeply embedded in their religious practice.

Within the last fifteen years some Splitters, in search of employment, started to move to Western or Westernized countries. Splitter immigrants often asked physicians in their new countries to circumcise their male infants. These requests were nearly always denied. The immigrants solved their access problem in two ways. First, as Splitters became more assimilated into their new country, some of them became physicians. Splitter doctors were usually willing to circumcise and the family would recite the customary prayers. Second, many Splitter immigrants would travel from time to time to their country of

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255. See note 91 *supra*.

origin, and having a male infant often became an occasion to visit their home country where the ritual could be performed.

Suppose that mortality and morbidity data on Splitters' circumcisions in the last twenty years reveal that their safety record is comparable to that in Western or Westernized countries for boys circumcised in the first ninety days after birth. Scientists and medical researchers not affiliated with the group assessed the medical risks and benefits of the group's circumcision practice. They found that the benefits slightly outweigh the risks in some African countries with high HIV/AIDS rates (discovered because some Splitters work in Africa as missionaries and nurses), the risks slightly outweigh the benefits in the Middle East (the Splitters' region of origin) and in the United States (discovered because some Splitters came to the U.S. for work), and the risks moderately outweigh the benefits in Europe, Australia, New Zealand, and Latin American countries.

In the last 20 years the Splitters have started to immigrate to the fictitious European nation of Vasturia, a multiethnic country with a history of tolerance. Vasturians have generally welcomed the group, as they admire the industriousness and lively culture of its members. The only contested point is circumcision. Some Vasturians are indifferent. Others find the practice strange. Still others view it as mutilative. Although Vasturian law protects freedom of religion, it draws the line for this protection at what it considers harmful religious practices. For example, Vasturian courts have prevented couples from not allowing their children to finish high school for religious reasons, and practitioners of a minor sect from sacrificing animals for religious reasons. Some Vasturians urged their Parliament to ban circumcision without medical indication. The Parliament declined to do so. It cited a statute requiring that disputed practices first be referred to Vasturia's Ethical Advisory Board ("EAB") for a ruling on whether a practice is morally permissible.

The EAB is confronting a narrower version of the question addressed here. Assume that the EAB agrees with my arguments advanced in previous sections of this Article. This assumption yields the narrower question: whether the Splitters' 40-year practice of circumcision counts in favor of the moral permissibility of that practice.

It is difficult to see why it should count for very much in favor of moral permissibility. Let us restrict consideration to Splitter circumcisions performed in Vasturia, elsewhere in Europe, in the Middle East, in the United States, and in Latin America. If the very first Splitter circumcision performed in the Middle East under this nascent practice was not morally permissible, then the performance of additional circumcisions to date does not make the practice morally permissible, unless the practice were to become safer than it is today. In fact, were the Splitter circumcisions to date all morally impermissible, then to continue the practice indefinitely into the future would seem to add to the number of morally impermissible circumcisions.

To be sure, the Splitters are enormously invested in circumcision. Should they cease this practice, the impact of their not circumcising would upset their religious rituals, their social identity, and their relationship to God as they understand God. Despite this impact, their forty years of religious history do not make their circumcisions morally permissible. That is because consequentialist considerations reveal a slight net medical benefit only in some African nations, and a slight to moderate net medical deficit elsewhere in the world. In contrast, the tissue loss, genital salience, permanent modification, and gender equality arguments jointly and severally support an anticipatory autonomy right-in-trust for the benefit of male minors not to be circumcised without medical indication. This right has enough weight to override even moderate net medical benefits.

At this point, let us drop the hypothetical supposition that Islam and Judaism do not exist, and ask whether the case against the Splitters leads to a similar case against ritual circumcisions performed by Muslims and Jews. Here, disappointed expectations are much greater and impose substantial psychological, social, and religious costs. Plus, the total number of Muslims and Jews is much larger than the total number of Splitters. An extension of the previous argument brings in an anticipatory autonomy right-in-trust not to be circumcised. This right suggests that for Muslims and Jews to continue to circumcise male minors in the future would only increase the number of morally impermissible circumcisions.

Still, this extension is too swift. In Islam, the obligation to circumcise is not in the Qur'an,<sup>256</sup> and it is not one of the five pillars of the religion; it comes from aḥādīth (singular, ḥadīth).<sup>257</sup> Aḥādīth are tradition reports of what the Prophet Muhammad said or did, including sometimes oral reports of his companions or successors.<sup>258</sup> Aḥādīth are then interpreted through *qiyas*, *ijma*, *ijtihad*, and eventually *shari'ah*.<sup>259</sup> Some aḥādīth mention circumcision, often in combination with other practices said to belong to the *fitrah*, which means roughly the basic human nature or natural predisposition.<sup>260</sup> In any given ḥadīth expound-

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256. However, Qur'anic exegesis sometimes interprets particular verses as informing circumcision. SALAYMEH, ISLAMIC LAW, *supra* note 60, at 114.

257. See Alahmad & Dekkers, *supra* note 20, at 2.

258. SALAYMEH, ISLAMIC LAW, *supra* note 60, at 28.

259. *Qiyas* is analogical reasoning, which is the means by which an Islamic "jurist must make the effort" (*ijtihad*) to come up with an answer to a question of Islamic law (*shari'ah*). 7 ENCYCLOPEDIA OF RELIGION 4566 (Lindsay Jones 2d ed., 2005). *Ijma* is consensus. *Id.*

260. It is outside the scope of this Article to tackle the complicated Islamic analyses of the *fitrah*. For a start, see SALAYMEH, ISLAMIC LAW, *supra* note 60, at 116, 120-23.

ing on the *fiṭrah*, the practices may be as few as three or as many as ten, with five being fairly common.<sup>261</sup>

One way of presenting the content of many aḥādīth is to say that five things are *fiṭrah*: circumcision, shaving the pubic hair, trimming the mustache, paring one's nails, and plucking the hair from one's armpits.<sup>262</sup> Other practices sometimes mentioned are "growing a beard, cleaning teeth, inhaling water to clean the nose, gargling, . . . washing finger joints, . . . and washing the genitalia."<sup>263</sup> To non-Muslims and perhaps to some Muslims, the practices on such lists might seem to lack a uniting thread or nature. Everything that grows can grow back except for the foreskin. Many items on such lists concern cleanliness. One scholar opines that "[u]nderarm and pubic hair likely attracted body lice, which may explain why they were selected for grooming."<sup>264</sup> She considers it possible that circumcision, which is not always mentioned in similar aḥādīth, "may not have been part of the initial transmission of the tradition-report."<sup>265</sup>

If these ruminations are on the right track, circumcision seems to have a somewhat different role in Islam from its role in Judaism. In Islam circumcision seems less central, at least in some historical periods, than it is in most of the Jewish tradition.<sup>266</sup> Also, Islam has sometimes sought converts, and encompasses a wide range of peoples from different races, ethnicities, and cultures.<sup>267</sup> Its requirement of circumcision has been projected onto different groups, some of which had pre-Islamic circumcision practices and some of which did not.<sup>268</sup> Circumcision does not make Muslims into a single people.<sup>269</sup>

To sum up: the longevity of religious circumcision practices is a consideration in assessing the moral merits of performing this surgery on male minors. If a religious practice of circumcision has existed for only forty years, as with the hypothetical Splitters, the longevity consideration has little force. The situation is different in the cases of

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261. *Id.* at 121.

262. *Id.* at 120-23; Munzer, *German Circumcision Controversy*, *supra* note 218, at 526 n.108.

263. SALAYMEH, ISLAMIC LAW, *supra* note 60, at 121.

264. *Id.*

265. *Id.*

266. GOLDMAN, *supra* note 61, at 12-14.

267. KÜNG, ISLAM, *supra* note 242, at 212-15, 241, 302-04, 313-17, 397-406.

268. LENA EILE, JANDO: THE RITE OF CIRCUMCISION AND INITIATION IN EAST AFRICAN ISLAM 1 (1990) ("[C]ircumcision is not an integral part of Bantu culture but many tribes practice it, either as an original institution or as an adoption from Nilo-Hamites or from Arabs.").

269. In the late antique period, circumcision was not a marker of Muslim identity, but perhaps it was on the verge of becoming one in the medieval period. SALAYMEH, ISLAMIC LAW, *supra* note 60, at 133-34.



age-old circumcision practices in Islam and especially Judaism. Ceasing either or both of these practices would impose significant psychological, social, and religious costs on Muslims and Jews. These costs are relevant to any consequentialist analysis of the moral permissibility of religious circumcisions. Nevertheless, the principal arguments of this Article—based on tissue loss, genital salience, and permanent modification—are deontological, not consequentialist. Longevity does not override or render inapplicable the moral impermissibility of circumcision without medical indication. Indeed, an appeal to the costs of ceasing a long-standing practice of circumcision is largely orthogonal to a case based chiefly on deontological considerations.

### *C. Social Meaning*

So far I have concentrated primarily on longevity and mentioned the social meaning of circumcision only to stress that it is more or less equally deep for Jews, Muslims, and Splitters. Of course, it would be necessary to fill out the Splitter example to make clear why the role of circumcision is on a par with its roles in Judaism and Islam. That would be an enormous task. Plus, it must be acknowledged that the Splitter example can in one respect never be a complete parallel. The earliest Israelites, Jews, and Muslims were all pre-modern peoples. The Splitters are a modern people. It is debatable whether this difference makes a difference. It is inaccurate to say that Jews and Muslims alive today are pre-modern peoples.

The purpose of this section is to analyze more carefully the social meaning of circumcision for Jews and Muslims. The Splitters are now excused. Here, *social meaning* is the significance of a practice to members of a particular group based on their expectations, common knowledge, and norms. Expectations are dispositions to predict that some event will occur or that some persons will do certain things.<sup>270</sup> To say that members of a group have certain expectations does not imply that these expectations are rational or legitimate; that would require argument.<sup>271</sup> Common knowledge, as understood here, exists when most members of a group (1) know that most members of the group usually know certain things, know (2) that most members know that most members usually know these things, and (3) so on. The words “and so on” do not imply that this nesting of knowledge clauses proceeds indefinitely, for most individuals cannot keep in their heads more than a few iterations of such knowledge clauses.<sup>272</sup> The term “norms” has the

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270. Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEXAS L. REV. 425, 427-28 (1982).

271. For discussion of rational and legitimate expectations, *see id.* at 426-35.

272. This account of common knowledge is less technical than, but otherwise is broadly similar in inspiration to, DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 56 (1969) (defining “common knowledge”);

same meaning here as it did in Part IV. Although it is possible to analyze social meaning without referring to norms, in the account to follow norms are important as an enforcement mechanism.<sup>273</sup>

From sections XI.A and XI.B, it is evident that Jewish and Muslim circumcision practices, though overlapping in some ways, are unlikely to have the same social meaning. Thus, at the very least, it would be necessary to analyze Jewish and Islamic circumcision separately. I shall argue that there are enough differences *within* Jewish and Islamic circumcision practices to isolate different social meanings within each group.

To carry out such an investigation as an anthropological or sociological enterprise would be a huge undertaking, and limits on space preclude it here. Thus, I introduce some hypothetical Jewish and Muslim groups and attempt to explicate the different social meanings of circumcision within them. The hypothetical Jewish groups are committed traditionalists, accommodators, and resisters. The hypothetical Muslim groups are Sunnah conservatives and secular liberals. These various groups occupy different places on a spectrum, or spectrums, of positions on circumcision. I make no claim that these groups exhaust the hypothetical, or actual, Jewish or Muslim groups one might examine.

#### 1. Committed Traditionalists (Judaism)

Of the hypothetical groups discussed here, committed traditionalists occupy a stringent position on the spectrum. They do not, indeed, practice *metzitzah b'peh* or allow a mohel to use his thumbnails to remove the membrane covering the glans or other parts of the foreskin.<sup>274</sup> However, they insist on circumcision *milah* and *peri'ah*, and

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STEPHEN R. SCHIFFER, MEANING 30-36 (1972) (analyzing conditions for “mutual knowledge”).

273. Ralph Wedgwood, *Is Civil Marriage Illiberal?*, in AFTER MARRIAGE: RETHINKING MARITAL RELATIONSHIPS 29 (Elizabeth Brake ed., 2016) (analyzing the social meaning of marriage using expectations and common knowledge). Wedgwood points out that one could introduce norms of the sort explicated by Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 ETHICS 725 (1990), but he considers it unnecessary for his purposes. *See id.* at 49-50. On how norms arise, see EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS (1977).

Lawyers may be unfamiliar with the term “social meaning” but they are familiar with the concept of social meaning in, for example, Justice Harlan’s dissent in *Plessy*. He argued that the social meaning of separate but equal railroad cars for Caucasians and “colored persons” is not securing equality for all, but rather depends on “race hate,” denial of “civil rights solely upon the basis of race,” and the supposed inferiority of colored persons. *Plessy v. Ferguson*, 163 U.S. 537, 552, 557, 559, 560 (1896) (Harlan, J., dissenting). Justice Harlan does not explicitly use the philosophical scaffolding in text accompanying *supra* notes 270-273.

274. *See supra* text accompanying notes 93, 235.

accept the principle of *piku'ach nefesh* as it pertains to exemptions from circumcision.<sup>275</sup> It does not bother them if God neglects to explain why circumcision is required of each male. Committed traditionalists take very seriously the Abrahamic covenant in *Genesis* 17:9-14. They place no stock in hygienic or prophylactic arguments for circumcision. To them, no substitute exists for a ritual circumcision with appropriate prayers. Committed traditionalists lay stress on verse 14: “[a]nd if any male who is uncircumcised fails to circumcise the flesh of his foreskin, that person shall be cut off from his kin: he has broken My covenant” (Tanakh translation).

The foregoing matters are common knowledge among committed traditionalists. Almost every adult and adolescent member of the group expects almost every other adult and adolescent member to conform to these requirements as elaborated elsewhere in the Torah and rabbinic writings. Verse 12 establishes the eight-day-norm. Verse 14 states a norm that indicates what is to befall the uncircumcised Jewish male: he is to be cut off from his fellow Jews. Toleration and multiculturalism are not seen as relevant to the obligation to circumcise.

The common knowledge, expectations, and norms just described have an impact on an uncircumcised boy. Committed traditionalists as limned here consider an uncircumcised boy to be more than socially anomalous. Both the boy and his parents would suffer grievously if he were to grow up in a community made up principally of committed traditionalists. If parents of a newborn male indicate that they are not planning a bris, members of the community would remind them that they are violating one of the most important tenets of the Jewish tradition. The reminder might come more than once over several days. If the boy's parents remain stubborn, other members of the community might sever ties with them.

If severing ties is not enough to move the boy's parents, additional sanctions could follow. The boy's parents would encounter continued sharp criticism by their adult peers and maybe become pariahs in the community. Other children would probably tease the boy mercilessly if they discovered his uncircumcised status in a locker room or another context. Once the despised boy becomes an adult, it would be difficult for him to find a Jewish partner from his community who is willing to marry him. Thus, the social meaning of circumcision for committed traditionalists is that it comes from an indefectible divine commandment, is mandatory for Jewish males, and plays a significant role in Jewish religious identity.

As a first reaction, the community just depicted seems highly intolerant. It seems hard to justify the teasing by his schoolmates. It is regrettable that the disapproval of the committed traditionalist community would fall so heavily on the child as well as his parents. It would seem, then, that from a secular point of view the community sketched

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275. See *supra* text accompanying notes 232, 238-240.

here is one to be wary of, not applauded. It might remind some readers of Susan Moller Okin's good sense in favoring a right of exit from one's group of origin.<sup>276</sup>

In a way, this reaction misses the point. Committed traditionalists are not looking at this matter from a secular perspective. A person who points out the fate of an uncircumcised boy and his parents in a committed traditionalist community might be simply predicting, not endorsing. It would be consistent to maintain both that the prediction is well supported and that such reactions by schoolmates and other parents ought to be opposed rather than endorsed. Yet, it seems unlikely that opposition would come from the committed traditionalist community itself.

## 2. Accommodators (Judaism)

The hypothetical accommodators make room for occasional members of their community who do not circumcise their sons. Most accommodators circumcise for reasons of tradition. Members of the community are generally well educated. It troubles them a bit that *Genesis* 17:9-14 does not explain what is defective about being intact, other than that God required circumcision as a sign of a covenant between God and Abraham and his descendants.<sup>277</sup> Truth be told, not all accommodators believe that God exists. Even the more numerous accommodators who believe in God have enough exposure to ancient, medieval, and contemporary Jewish writings to be skeptical of the beliefs and normative practices of committed traditionalists.

It is common knowledge among most accommodators that the text of *Genesis* 17:9-14 probably was not written at the time of Abraham (c. 1850 B.C.E.), and that it might date from the Babylonian captivity (c. 586 B.C.E.-c. 538 B.C.E., with qualifications) or early in the Second Temple period (beginning c. 520 B.C.E.), or some other time.<sup>278</sup>

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276. See *supra* text accompanying note 89.

277. On *Genesis* 17, see generally JOHN J. McDERMOTT, *READING THE PENTATEUCH: A HISTORICAL INTRODUCTION* 49-50 (2002). God's covenant with Noah in *Genesis* 9:9-17 does not require the Israelites to do anything, whereas God's covenant with Abraham requires circumcision.

278. THE NEW JERUSALEM BIBLE 2055 (1985) (Chronological Table) says that Abraham arrived in Canaan in "[a]bout 1850" B.C.E. On the historicity and authorship of *Genesis*, see Jon D. Levenson, *Genesis: Introduction*, in THE JEWISH STUDY BIBLE 8, 11 (Adele Berlin & Marc Zvi Brettler eds., 2004) (commonly known as the Tanakh translation). Levenson observes that "no evidence has turned up that establishes that Abraham, (his son) Isaac, Jacob, or Joseph existed." *Id.* at 11. For the view that there were separate deportations of Jews to Babylonia in 597, 586, and 582 B.C.E., see James D. Purvis (revised by Eric M. Meyers), *Exile and Return: From the Babylonian Destruction to the Reconstruction of the Jewish State*, in ANCIENT ISRAEL: FROM ABRAHAM TO THE ROMAN DESTRUCTION OF THE TEMPLE 201, 202 (Hershel Shanks ed., rev. and expanded ed., 1999). According to Purvis, when the Persians conquered the Babylonians in 539

Further, it is common knowledge among most accommodators that circumcision might have been practiced before Israelites and Jews existed, and that among other circumcising peoples the practice is typically a coming of age ritual tied to puberty rather than a neonatal practice. Nevertheless, few accommodators reject circumcision. Most of them expect that most other parents will in fact circumcise their male offspring eight days after birth, and that failure to circumcise is contrary to the religious norms of the accommodators' community. Most expect that the majority of parents will request a local anesthetic for the procedure.

If a couple announced that they did not intend to circumcise their newborn son, this would almost surely raise eyebrows among other accommodators, for the circumcision rate among accommodators is 95 percent. Under norms of their community, members would likely try to persuade the couple to rethink the decision. They would remind the couple that circumcision is both a long-standing practice and a source of Jewish identity. However, if such entreaties fail, few accommodators would chastise the parents or end their friendships with the couple.

As the uncircumcised infant grows up and goes to school, if his uncircumcised status became known to classmates, they would be unlikely to tease the boy, but would still consider him anomalous. Once the boy matured and sought a marriage partner within the group, many female (and male) prospects might be a bit put off by his uncircumcised penis. Other prospects might consider his penis to be simply a novelty, not a deal breaker. In short, the social meaning of circumcision for accommodators is that it is an important ritual and supports Jewish identity, but is not a major key to Judaism. An uncircumcised male, though anomalous, would not be excluded from the community.

### 3. Resisters (Judaism)

The hypothetical resisters, though a community of their own in some respects, inhabit geographical locations and a social and religious space with other Jews.<sup>279</sup> It is common knowledge among resisters that all those who associate themselves with ultra-Orthodox, Orthodox, Conservative, Reform, and Reconstructionist Judaism are to be regarded as Jews. Similarly, observant and secular Jews are to be seen as Jews. Resisters expect that fellow resisters will embrace all Jews as Jews. They also expect that many Jews will regard resisters as

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B.C.E., Jews returned to their country in "successive waves," and "[t]he first return occurred not long after 539 B.C.E." *Id.* at 216, 218. He says the "foundations of the Second Temple were laid on December 18, 520 B.C.E." *Id.* at 218. Other sources might differ on these various dates.

279. This subsection is indebted to GOLDMAN, *supra* note 61. He articulates a way for Jews who reject circumcision, but fiercely consider themselves to be Jewish, to interact with the much larger community of Jews who circumcise. He never uses the appellation "resisters" and perhaps would dislike it.

defectively Jewish, or at least religiously anomalous, because they reject circumcision.

Resisters oppose circumcision on multiple normative grounds. They consider circumcision unnecessary to Jewish survival and identity. They see any health claims made on behalf of circumcision as unjustified. Beyond that, they oppose circumcision because, in their view, it causes needless pain, poses medical risks to male infants, and has an adverse effect on male sexuality and psychological health.

Resisters also have a positive normative agenda. They support a norm of open dialogue on Jewish emotional reactions to circumcision. Some emotions come from Jewish women who have seen their son circumcised:

I felt as if I might pass out at the sight of my son lying there, unable to move or defend himself. His screams tore at my heart as his foreskin was heartlessly torn from his penis. Too late to turn back, I knew that this was a terrible mistake and that it was something that no one, especially newborn babies, should ever have to endure.<sup>280</sup>

Some Jewish men express their feelings about having been circumcised by saying that “[n]o one had the right to cut my foreskin off!”<sup>281</sup> and “I feel violated and abused.”<sup>282</sup>

Resisters also favor norms of ending a culture of silence surrounding Jewish circumcisions,<sup>283</sup> creating alternative rituals to circumcision such as a naming ceremony for newborn males or a *bris shalom*,<sup>284</sup> and com-

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280. *Id.* at 50 (quoting B. Raisbeck, *Circumcision: A Wound Which Lasts a Lifetime*, HEALING CURRENTS 21 (1993)). It is unclear whether the circumciser used any anesthetic. If he did, it was insufficient.

281. GOLDMAN, *supra* note 61, at 42 (anonymous statement).

282. *Id.* (anonymous statement). It is unknown what percentage of Jewish men experience such feelings.

283. *Id.* at 65 (“The primary way that circumcision is perpetuated in the Jewish community is through silence. The silence surrounding circumcision is a certain indication that there is something to hide.”).

284. Norm Cohen provides such a *bris* with prayers and passages from the Torah. *See id.* at 97-100. *See also* LISA BRAVER MOSS & REBECCA WALD, CELEBRATING BRIT SHALOM (2015) (describing such a celebration); Michelle Boorstein, *Jewish Parents in US begin to Question the Need for Circumcision*, THE GUARDIAN (Jan. 17, 2014), <http://www.theguardian.com/world/2014/jan/17/us-jewish-parents-question-circumcision> (there is “a small but growing number of Jews who are slowly altering what has for millennia been considered perhaps Judaism’s core rite”); Hayley Mick, *Jewish, and Uncircumcised*, THE GLOBE AND MAIL (Toronto), May 22, 2007 (last updated Mar. 27, 2017), <https://www.theglobeandmail.com/life/jewish-and-uncircumcised/article686203/> (reporting that there is “a small but growing number of Jews who are rejecting an ancient, fundamental tenet of their faith”).

posing a polite but frank way of declining an invitation to a traditional bris.<sup>285</sup> For resisters, then, the social meaning of circumcision is that it is a painful, risky, and unwarranted practice for Jewish infants and engenders negative emotions and psychological problems for parents who inflict it on their male offspring.

#### 4. Sunnah Conservatives (Islam)

The hypothetical Sunnah conservatives accept as common knowledge that the Prophet Muhammad had some direct encounters with God, that he conveyed the results of these encounters to his companions and successors, and that many of these results appear in the Qur'an and aḥadīth. Sunnah conservatives also accept as common knowledge that some aḥadīth indicate that the *fiṭrah* requires certain practices, that one of these practices is circumcision, and that circumcising male offspring sometime between infancy and puberty is an Islamic obligation. This group is conservative in that it draws on and seeks to preserve early Muslim traditions of circumcision. It is Sunnah in the sense that it follows the Sunnah of Muhammad himself—his sayings, behavior, and religious practices. Members of the group are divided about so-called female circumcision (*khafd*) but firmly support a norm of male circumcision (*khitān*).

Sunnah conservatives expect that all members of the group will carry out the duty to circumcise. They also expect that other members of the group will politely follow up with any parents who seem to be needlessly delaying the circumcision of their son. Potentially recalcitrant parents expect that they will encounter some nudging. It is common knowledge among the group that members cannot force their male offspring to stay in the Sunnah conservative community, but that most offspring will in fact remain in that community. Moreover, it is common knowledge that as most males reach a marriageable age, an uncircumcised male would be at a disadvantage in regard to marriage prospects. For this reason, most such males are likely to wish to be circumcised at the customary age, and from a practical point of view it might make little sense to defer their circumcision to adulthood. The social meaning of circumcision to Sunnah conservatives is that it is an expected and obligatory practice deeply rooted in the Islamic tradition.

All the same, most Sunnah conservatives dislike placing great social or religious pressure on either parents or young boys. If a couple neglected to have their son circumcised at the usual age, this would not be cause for ending friendships with them or excluding them from social activities. Schoolchildren being what they are, if the uncircumcised status of a boy happened to become known, a few children would tease the boy. Other children might commiserate with the boy on the ground that it was not his fault, but his parents' fault, that he remains uncircumcised after having reached the usual age. The children of Sunnah

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285. *Id.* at 105 (quoting a poem by Laurie Epstein).

conservatives, both boys and girls, are quite modest and thus unlikely to learn of a peer's uncircumcised status.

#### 5. Secular Liberals (Islam)

The hypothetical secular liberals make up a rather different Muslim community. Adult members have the following socioeconomic profile: urban, wealthy, highly educated, well-traveled, worldly, and privileged. Most drink alcohol. Some dress immodestly. Some are sexually liberated. They count many non-Muslims among their friends and acquaintances. Secular liberals evaluate prospective wives and husbands for their sons and daughters by whether a couple are well-suited for each other and whether prospects have a similar class and professional background. All things being equal, secular liberals prefer that their sons and daughters marry other Muslims. But because all things are rarely equal, religious exogamy does not pose much of a problem.

A large majority of secular liberals circumcise their sons. It is common knowledge among them that historically circumcision has been a hallmark of Islam, and that only a small percentage of other secular liberals would frown on parents who refused to circumcise their sons. It is also common knowledge among secular liberals that circumcision is highly painful if done without a local anesthetic (for infants) or general anesthesia (for older boys and adolescents). Secular liberals know that ritual circumcisers without substantial medical training could botch the procedure. They also know that engaging a urologist to circumcise an infant is a good way to hold down medical risk and avoid possible traumatic memories for the child. Indeed, a norm has emerged that it is not sensible to circumcise in any other way.

Most secular liberals expect that most other secular liberals will behave in the same way. They do not expect an imam or any other Muslim cleric to be present for the circumcision of their sons. They expect the main emphasis will be on how lavish the post-circumcision party is rather than any religious aspect of the procedure. Thus, for secular liberals, the social meaning of circumcision is that it has only a small religious dimension and even less ritual significance, but in practice is done chiefly out of a loose tie to Islamic practice and tradition.

#### 6. One Spectrum or More?

As understood here, a spectrum is an array of the social meanings of different religious positions on circumcision. A spectrum in this sense does not presuppose that positions are continuous across an array (that is, without intermittent breaks). Nor does it presuppose that a spectrum has a definite stop at either end.

One might start with a spectrum of social meanings of religious intensity regarding circumcision, with the highest intensity on the left and lowest intensity on the right. If one represents this spectrum as a line, and if one supposes that all positions discussed here fall on this



spectrum, the Jewish committed traditionalists would be on the far left, Muslim Sunnah conservatives next to the right, followed by Jewish accommodators, Jewish resisters, and Muslim secular liberals. It might seem odd to place Jewish resisters before Muslim secular liberals. After all, the former reject circumcision and the latter embrace it, even though such embrace has little religious dimension. An argument to the contrary is that Jewish resisters are religiously committed to preserving other Jewish traditions and seek a substitute for circumcision. That argument has some force given that Muslim secular liberals are religiously lukewarm.

One objection to the foregoing spectrum is that the Jewish and Muslim traditions of circumcision differ sufficiently in their origins, understanding of God, and circumcision practices that they do not belong on the same spectrum. If this objection has merit, the fix is easy: just create two spectrums based, respectively, on the social meanings of circumcision in Judaism and the social meanings of circumcision in Islam.

A rather different objection is that religious intensity should not be the sole driver of different social meanings. Some other possible drivers of social meanings are the extent to which the circumcision practices are (1) text-based, (2) practice-based, (3) strictly enforced by a community, and so on. Further discussion of these possibilities lies outside the scope of this Article.

#### 7. Social Meaning and Underlying Practice

It is nevertheless within the bounds of this Article to emphasize the relation between a social meaning and a practice that underlies it. Readers might well have different evaluations of various social meanings discussed in this section. Those evaluations, however, are not identical with evaluating the underlying practice—namely, circumcision. Of the five hypothetical groups examined here, only Jewish resisters would do away with circumcision altogether. In my view, the underlying practice of circumcision has to be assessed on its own merits.

The same would be true for a wide range of underlying social practices, past and present. The social meanings of stoning adulterers, torturing heretics, burning supposed witches, gladiatorial combat, duels, sati (suttee), and binding the feet of young Chinese girls hardly made those practices morally permissible. Some would add the social meanings of professional boxing and American football to the list. Even long-standing traditions can sometimes be changed or dropped without moral loss. Each practice and its corresponding social meaning must be supported, or not, on its own merits. In my judgment, the social meanings of circumcision do not justify the underlying practice of circumcision. More precisely, they do not justify circumcising male minors without a medical reason. As I have argued, male minors have a moral anticipatory autonomy right-in-trust not to undergo nontherapeutic circumcision.

*D. And Yet*

Part II invited those who might disagree with me to reconsider their positions. Imagine that a professor of moral philosophy who is also an observant Orthodox Jew and a scholar of Judaism were to read this Article. Imagine that he agrees with my arguments and conclusions to the effect that it is difficult, and maybe impossible, to show circumcision to be morally permissible with the resources of secular moral philosophy alone. Still, he would say that circumcision is the sign of a covenant with God and a fundamental factor in Jewish identity. He has to decide what kind of person he is to be: a person who follows secular moral philosophical arguments no matter where they lead, or a person who follows the Torah and the Talmud no matter what they say.

It is possible to strengthen the Jewish philosopher-scholar's imagined response. Which is worthy of our ultimate allegiance, morality or God? This question might appear strange, for on some accounts moral requirements and prohibitions overlap or are even identical with religious requirements and prohibitions. And despite the so-called Euthyphro problem, some distinguished philosophers of religion defend a version of the divine command theory of morality.<sup>286</sup> Suppose that under secular morality, nontherapeutic circumcision is morally impermissible. Suppose also that God commands that eight-day-old Jewish males be circumcised. My imagined Orthodox Jew can take a cue from an article by Robert Adams which says, "[r]eligion is richer than morality, because its divine object is so rich."<sup>287</sup> God, says Adams, is "a suitable object of maximal devotion,"<sup>288</sup> and morality is not.

It will take insight and argument to make this move do the work the Jewish philosopher-scholar might desire. Think of the reverence Kant had for the moral law.<sup>289</sup> Even then, the move has limits. It does not seem to apply to deism or to polytheistic religions like Hinduism or nontheistic religions like Buddhism or Jainism. Neither does it clearly apply to a would-be member of a monotheistic religion unless that member believes in God. It would not seem to apply, then, to a Jewish

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286. See, e.g., ROBERT MERRIHEW ADAMS, *THE VIRTUE OF FAITH AND OTHER ESSAYS IN PHILOSOPHICAL THEOLOGY* chs. 7-9 (1987) [hereinafter ADAMS]. See also *Euthyphro*, in 1 *THE DIALOGUES OF PLATO* 309 (B. Jowett trans., Clarendon Press, Oxford, 4th ed. 1953).

287. Robert Merrihew Adams, *Saints*, in ADAMS, *supra* note 286, at 172.

288. *Id.*

289. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* [1788], in KANT'S *CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS* 260 (Thomas Kingsmill Abbott trans., 6th ed., 1909) ("Two things fill the mind with ever new and increasing admiration and awe, the oftener and the more steadily we reflect on them: *the starry heavens above and the moral law within.*") (emphasis in original).

atheist who wants to circumcise his or her son solely for reasons of tradition. Nor would it seem to apply to Christian parents in the United States who want to have their son circumcised for hygienic, social, or aesthetic reasons.

## XII. WHY LEGAL INTERFERENCE WITH NONTHERAPEUTIC CIRCUMCISION IS NOW ILL ADVISED

Section XI.A rejected legal constraints on religious circumcision practices. I want to underscore some of the reasons for that rejection and extend them to secular nontherapeutic circumcisions. (1) Although I have had the privilege of presenting versions of this Article to different groups, it may have deficiencies in analysis and argument of which I am unaware. Family, friends, and colleagues often remind me of my fallibility.

(2) No consensus exists on the harms of nontherapeutic circumcision or on the balance of harms and benefits.<sup>290</sup> This lack of consensus results partly from a lack of data and of dispassionate analyses of that data.<sup>291</sup> Some harms, such as psychosexual harms, are difficult to measure. People and groups that favor, or oppose, nontherapeutic circumcision sometimes are biased for, or against, the practice. Charges of bias are common in the secondary literature.<sup>292</sup> Medical reports of complications from circumcisions gone awry are scattered in medical letters or brief studies of particularly bad outcomes, and epidemiological work varies greatly in quality.<sup>293</sup>

(3) While Jews and Muslims have the largest stake in continuing to circumcise, many non-Jewish, non-Muslim parents in the United States are also attached to the practice. Almost all parents have a non-negligent interest in the future well-being of their sons in deciding to circumcise them, though some such parents might feel pressure to circumcise from religious relatives or their secular social set.<sup>294</sup>

(4) Recent debates on circumcision turn partly on what a child is, and what rights a child has.<sup>295</sup> I believe that a minor child has rights, and that among these is a right not to be circumcised without a medical indication.<sup>296</sup> Granted, a child's parents might belong to a transhistorical religious group that, at or near its historical origins, never enter-

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290. *See supra* text accompanying notes 141-188.

291. *See supra* text accompanying notes 205-222.

292. *See, e.g.*, Frisch et al., *supra* note 150.

293. *See, e.g.*, sources cited in notes 10-14, 28, 167, 182-186, 190, and 197.

294. *See* Joseph Mazor, *On the Strength of Children's Right to Bodily Integrity: The Case of Circumcision*, 34 J. APPLIED PHIL. 1, 5, 14 (2017).

295. Munzer, *German Circumcision Controversy*, *supra* note 218, at 504, 580-81.

296. *See supra* Parts III-VIII.

tained the idea that nontherapeutic circumcision is a moral wrong and a violation of a child's right. Belonging to such a group does not entail that his parents are entitled to circumcise him without a medical indication.<sup>297</sup>

Even if one were to resort to the law in some way, making nontherapeutic circumcision a crime would be the worst place to start.<sup>298</sup> Criminalizing the practice could result in large-scale noncompliance, or drive it underground, or both. There would likely be considerable resistance even to tinkering with tort law or family or administrative law. For instance, it would vex many parents if, to circumcise their infant son, they had to obtain a license in advance and attend a lecture on the pros and cons of circumcision as a condition of getting a license.

If some branch of the law placed restrictions or burdens on circumcision, a question could arise concerning whether religious groups, such as Jews and Muslims, should be exempt from these restrictions and burdens that would still apply to secular circumcisions. An *exemption* is legal relief for a group from a broad legal duty that applies to other persons in society.<sup>299</sup> Possible reasons for an exemption are that circumcision matters more to Jews and Muslims than it does to non-Jews and non-Muslims, and that Jews and Muslims have suffered, and still suffer, from discrimination compared to many persons who are neither Jewish nor Muslim.

Two classes of consideration more than offset the case for an exemption. First, there are reasonable beliefs that support placing restrictions and burdens on everyone if the legal interference is justified at all. They include beliefs that circumcision might bring more harms than benefits, that male minors have a right not to be circumcised because they cannot give autonomous informed consent, and that it makes little sense to try to make up for past and present discrimination by creating a sort of reverse discrimination in favor of Jews and Muslims.

Second, there are undesirable consequences of granting an exemption. Among them are reducing the unity of society, engendering resentment on the part of people who are neither Jewish nor Muslim, and

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297. See *supra* Parts III—VIII, XI.

298. As this Article went to press, Iceland was considering whether to make it “a crime to circumcise infant boys for nonmedical reasons.” Christina Caron, *Iceland Considers a Circumcision Ban, Alarming Religious Groups*, N.Y. TIMES, Mar. 1, 2018, at A6. My arguments do not make a case for criminalizing nontherapeutic religious circumcisions, and I fundamentally object to any use of my arguments for such a purpose.

299. This definition largely accords with KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 2 (2016). He does not discuss circumcision.

possibly raising an Establishment Clause issue by favoring Judaism and Islam over other religions (and non-religions).<sup>300</sup>

The upshot is that it would be better for now if the law butts out. It would be wise neither to interfere legally with religious or secular circumcisions, nor to place legal restrictions and burdens on circumcision with an exemption for Jews and Muslims. Instead, even if the harms of nontherapeutic circumcision markedly outweigh the benefits, some softer approach makes sense. For example, disseminating impartial information on harms and benefits might be a start. Perhaps it would help to say—if it is true—that the psychosexual reactions of individual males to circumcision vary widely. Maybe it would be good to require parents to give reasons why they wish to have their son circumcised. In the end, it is prudent to take the long view rather than to preach or hector. Many practices have stood for a long time before falling into disuse or being eliminated. Circumcision *metzitzah b'peh* is just one example.<sup>301</sup>

This Article, long as it is, cannot take up many legal and other issues. It does not consider whether both parents must agree before a male minor can be legally circumcised, or whether the voice of a biological parent legally counts for more than that of a nonbiological or adoptive parent. This paper does not ask how minor boys and girls should be treated under the law if a legal system requires equal treatment of the sexes.

It does not ask whether it is morally permissible, or permissible as a matter of medical ethics, for a physician to circumcise a male minor if it is morally impermissible for the parents to seek to have their newborn son circumcised. Neither does it inquire whether it is morally permissible, or permissible as a matter of hospital ethics, for a hospital to allow the circumcision of male minors if it is morally impermissible for the parents to seek to have their newborn son circumcised. This Article does not address whether, if parents discover that their child is teasing another boy at school because of his circumcision status, they have a moral obligation to insist that their child not tease because it is mean-spirited and hardly the other child's fault that he is, or is not, circumcised. Nor does it consider whether parents are morally permitted to treat as pariahs other parents who have decided either to circumcise, or not to circumcise, their newborn son. These and other issues are left for other days or other authors.

### XIII. CONCLUSION

This Article maintains that a strong case exists for the moral impermissibility of nontherapeutic circumcision, and for the claim that male minors have a moral right not to be circumcised without a medical

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300. U.S. CONST. amend. I.

301. See *supra* text accompanying notes 93-95.

indication. There are consequentialist and nonconsequentialist moral arguments against the practice of nontherapeutic circumcision. I have spilled ink on both. What I have called the tissue loss, genital salience, permanent modification, and gender equality arguments jointly and severally support a moral anticipatory right-in-trust to bodily integrity and autonomy for the benefit of male minors against being circumcised without medical indication. These arguments are deontological and hence are nonconsequentialist. The right not to be circumcised is limited and qualified in some ways. And in some circumstances, or for some populations, it might be outweighed on cost-benefit (consequentialist) grounds. It is doubtful that long-standing religious traditions of circumcision, such as in Judaism and Islam, are entitled to moral deference because of their longevity or social meaning. However, the arguments of this Article provide no adequate ground for restricting, by the criminal law or other legal provisions, circumcisions performed for religious reasons by Jews or Muslims.